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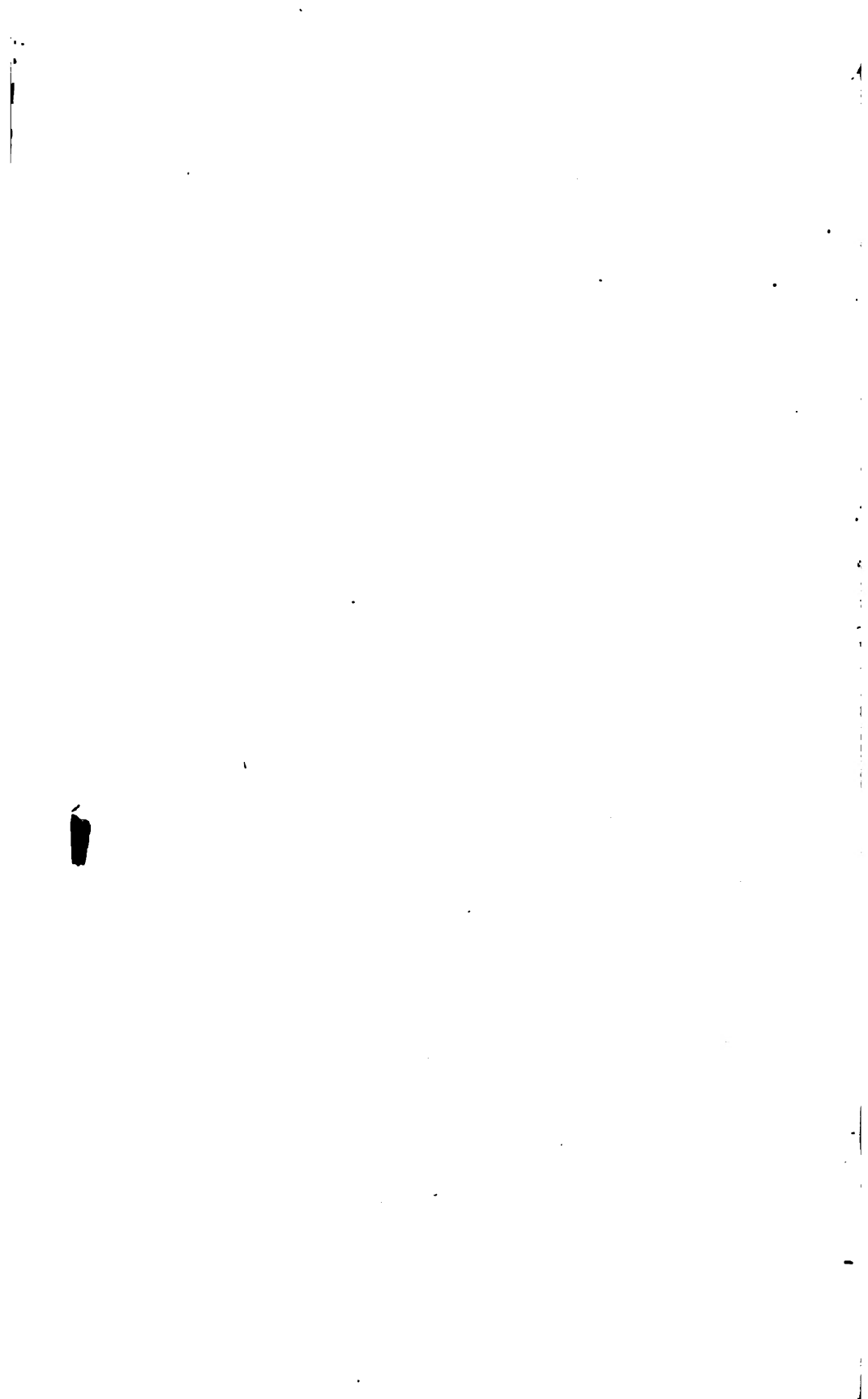


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ABBREVIATIONS USED—*a*, criticized; *d*, distinguished; *l*, limited; *o*, overruled; *s*, same case; small figures indicate the section to which reference applies; * indicates reference is to a point not mentioned in syllabus; — indicates not enough of opinion 1 given to determine what point in syllabus is referred to.



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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

(SECOND DIVISION)

FROM AND INCLUDING DECISIONS OF JANUARY 14, 1891, TO
AND INCLUDING DECISIONS OF APRIL 21, 1891,

WITH

NOTES, REFERENCES AND INDEX.

By H. E. SICKELS,
STATE REPORTER.

VOLUME CXXIV.

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1891.

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SECOND DIVISION.

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ALTON B. PARKER,

CHARLES F. BROWN,

ASSOCIATE JUDGES.

The Court of Appeals, Second Division, which was organized under section 6, article 6 of the Constitution, as amended in 1888, and which began its sessions March 5, 1889, having disposed of the cases assigned to it, adjourned without day on January 22, 1891.

On the same day, the Governor, on receipt of a certificate from the Court of Appeals, as prescribed by said section, designated the same justices of the Supreme Court who had constituted the original Second Division to form a new Second Division, which began its session on January 26, 1891, and to said Second Division the Court of Appeals assigned the cases on the calendar of January 12, 1891, from No. 151 to 894, both inclusive. — [REp.

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194 573
 OF THE
STATE OF NEW YORK
 (SECOND DIVISION)

COMMENCING JANUARY 14, 1891.

MARIA L. HOOD, as Executrix, etc., Appellant and Respondent,
v. JOHN N. HAYWARD, Impleaded, etc., Appellant and
Respondent.

The provisions of the Code of Civil Procedure in reference to the bringing of actions upon the bond of an executor or administrator provide three separate and distinct remedies, each independent of the other: First. Where an execution issued upon a surrogate's decree against the property of the executor or administrator has been returned wholly or partly unsatisfied (§ 2607); Second. Where letters have been revoked and a successor has been appointed (§ 2608); Third. Where letters have been revoked and no successor appointed (§ 2609).

The return of an execution unsatisfied is not essential to the maintenance of an action upon the bond of an executor whose letters have been revoked. (POTTER, J., dissenting.)

Where the letters of one of two co-executors are revoked and no successor is required to carry out the express provisions of the will, and none is appointed, as the statute contemplates in such case that the survivor will perform all the duties of the trust (§ 2602), he is the successor of the removed executor within the meaning of the statute, and, as such, can bring an action upon the bond of the latter without the return of an execution unsatisfied. (POTTER, J., dissenting.)

In such an action it appeared that plaintiff and the beneficiaries under the will had executed releases, to one of the two co-sureties upon the bond, from all liability under it to the extent of one-half of the penalty thereof, the releases stating that they were intended to operate as a satisfaction

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and discharge of one-half of the obligation of the bond so that the surety should be "released from all claim or demand for contribution on the part of his co-surety." Also, that they should not be construed as affecting in any manner any claim or demand against said co-surety. *Held*, that the releases did not operate to discharge the co-surety; but that he remained liable to the extent of one-half of the penalty of the bond.

The letters were revoked because of misappropriation of the funds of the estate by the removed executor. By the surrogate's decree upon the final settlement of his accounts he was directed to pay a sum exceeding the penalty of his bond. The surety was charged with interest upon one-half the penalty from the time of the misappropriation. *Held*, error; but that he was chargeable with interest from the date of the decree. Reported below, 48 Hun, 330.

(Argued October 10, 1890; decided January 14, 1891.)

CROSS-APPEALS from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 14, 1888, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The plaintiff appealed from so much of the judgment as refused to allow interest from August 1, 1875, or October 1, 1878. The defendant Hayward appealed from the whole judgment. There was no appeal on the part of the defendant Frederick H. Hood.

This action was brought on a bond executed by the defendants Hood, Hayward and one David Moffat upon the issuing of letters testamentary to the defendant Hood as executor of the last will and testament of Andrew Hood, deceased, by the surrogate of Westchester county, to recover damages sustained by the estate in consequence of the misconduct of the executor, Frederick H. Hood.

The plaintiff Maria L. Hood was an executrix and associated with the defendant Frederick H. Hood in the administration of the estate, but the bond was given on behalf of Frederick H. Hood, who was a non-resident at the time of the granting of letters testamentary.

The following facts appeared: Andrew Hood, the testator, died on the 18th day of March, 1864, leaving a last will and

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testament, which is set forth in the complaint. The will was duly admitted to probate by the surrogate of Westchester county on the 20th day of April, 1864, and on the 30th day of April, 1864, letters testamentary were issued by said surrogate to Frederick and Maria L. Hood, as executor and executrix named in said will. Upon an accounting had on or about the 6th day of January, 1869, there was found to be in the hands of the executor and executrix assets amounting to \$53,000 and upwards, and they were directed by the decree of the surrogate to invest the same in accordance with the provisions of the will. The defendant Frederick H. Hood, executor, had the charge and management of this sum of money, and invested \$29,100 thereof in the purchase of real estate situate in the city of Newark in the state of New Jersey, which said sum was wholly lost to the estate. Subsequently and on or about the 7th day of December, 1883, the said surrogate, upon an application for that purpose, revoked the letters testamentary granted to Frederick H. Hood, on account of investments of a portion of the moneys of said estate contrary to the decree of the surrogate made as aforesaid. In the month of May, 1885, the plaintiff instituted a proceeding before the surrogate praying that Frederick H. Hood, executor, account for the moneys received by him, and afterwards and upon the 31st day of July, 1885, the said surrogate made a decree disallowing the said investment of \$29,100, and ordering and directing that said sum, together with the further sum of \$2,675, amounting in all to the sum of \$31,775, be paid by said Hood, executor, to the plaintiff as executrix. Soon after the making of said decree, a copy thereof was duly served upon Frederick Hood, and payment of the money therein mentioned demanded of him, which was refused; and in September, 1885, the said surrogate granted leave to the plaintiff to bring an action on the bond. Moffat was released from any liability on said bond, excepting one-half the penalty thereof, to wit, the sum of \$10,000, leaving and reserving, however, and excepting all cause and causes of action against the defendant in this action and all liability under said bond.

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The substances of the releases are set forth in the dissenting opinion by POTTER, J. This action was commenced on the 15th day of September, 1885. The answer of the defendant sets forth that the bond was satisfied and discharged as to the defendant Hayward by reason of the discharge and release of said Moffat; that there had been no execution issued and returned unsatisfied upon the decree made by the surrogate fixing the amount of Hood's liability as executor; that the plaintiff was liable with the defendant Hood for any loss to the estate by reason of the investments above mentioned; the ten years Statute of Limitations and the six years statute were also pleaded. Other facts appear in the opinions.

John J. Macklin for plaintiff. The action was properly brought and all the statutory requirements preliminary thereto were complied with. (*Boyle v. St. John*, 28 Hun, 455; *Sperb v. McCoun*, 110 N. Y. 605; Code Civ. Pro. §§ 2481, 2608, 2609, 2610, 2692; *Annett v. Kerr*, 2 Robt. 556; *Haight v. Brisbin*, 100 N. Y. 219; *McKernan v. Roberts*, 84 id. 105; *Earl v. David*, 86 id. 634.) The provisions of the Code and Revised Statutes relating to the mode of prosecuting executor's bonds affect the remedy only. They may be modified by the legislature, and the remedy in force when the action is brought controls. (2 R. S. 85, 116; *Gerauld v. Wilson*, 81 N. Y. 573; *In re Hood*, 98 id. 363; 104 id. 103; Potter's Dwaris on Stat. 472; Code Civ. Pro. § 2610.) The cause of action is based upon the bond; the complaint alleges specific breaches thereof and demands judgment for the damages arising therefrom. The action is to be considered, as to whether or not a breach has been committed, irrespective of the proceedings in the Surrogate's Court, which only affect the remedy. The measure of damages is prescribed by statute, and is the loss sustained by the estate in consequence of the executor's misconduct. (*Hood v. Hood*, 85 N. Y. 571; *Haight v. Brisbin*, 100 id. 219; 2 R. S. 70, § 42; Code Civ. Pro. § 2640.) If the last proposition is not correct, it is claimed that the plaintiff is entitled to recover one-half of the penalty and interest

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thereon from August 1, 1875, or October 1, 1878, and that the judgment should be modified by allowing interest from either of these periods. (*Beers v. Shannon*, 73 N. Y. 292; *Hood v. Hood*, 85 id. 561; *Haight v. Brisbin*, 100 id. 219; *Brainerd v. Jones*, 18 id. 36; *Thompson v. McGregor*, 81 id. 598; *Berg v. Radcliff*, 6 Johns. Ch. 307.) The release to Moffat did not affect or impair the liability of his co-surety, Hayward, for half the penalty and interest. (*Irvine v. Milbank*, 56 N. Y. 635; 1 Pars. on Cont. 28, 29; *Benedict v. Rae*, 35 Hun, 34, 36; *Bronson v. Fitzhugh*, 1 Hill, 185; *Bank of Poughkeepsie v. Ibbotson*, 5 id. 462; *Matthews v. Chicopee*, 5 Robt. 711; Addison on Cont. [8th Eng. ed.] 1223; Chitty on Cont. 605, 606; *Hoyt v. Tuthill*, 33 id. 197; *Harbeck v. Pupin*, 55 id. 335, 339; Code Civ. Pro. § 1942.) The action may be maintained even if the plaintiff were also guilty of a devastavit. (*Wetmore v. Parker*, 92 N. Y. 76.) No judgment based upon the alleged ground that because plaintiff is as is claimed, a joint wrong-doer, she must make contribution could be allowed in this action. (*Boyle v. St. John*, 28 Hun, 455; *Sperb v. McCoun*, 110 N. Y. 605; *Springer v. Dwyer*, 50 N. Y. 19; *Gillespie v. Torrance*, 25 id. 306; *Lacher v. Williamson*, 55 id. 619; *O'Brien v. Karning*, 57 id. 649.) None of the grounds upon which the motion for a nonsuit was based are tenable. (*In re Hood*, 27 Hun, 579; *Porter v. Kingsbury*, 77 N. Y. 164; *Dawley v. Brown*, 79 id. 390; *Stowell v. Chamberlin*, 60 id. 272; Code Civ. Pro. § 2743.)

A. J. Dittenhoefer for defendants. The appellant became released when his co-surety, Moffat, was, without his consent, released under seal. (*Bronson v. Fitzhugh*, 1 Hill, 185; *Williams v. McGinness*, 52 Am. Dec. 561; *Line v. Nelson*, 38 N. J. L. 358; *Berry v. Gillis*, 17 N. H. 9; *Ayer v. Ashmead*, 31 Conn. 447; *McAlister v. Dennin*, 27 Mo. 40; *Armstrong v. Hayward*, 6 Cal. 183; *Frink v. Green*, 5 Barb. 455; *Shaw v. Pratt*, 22 Pick. 305; *Frickman v. Newhal*, 17 Mass. 580; *A. Bank v. Doolittle*, 14 Pick. 123; *Brown v. Marsh*,

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7 Vt. 320, 327; *Bunson v. Kincaid*, 3 Penn. St. 57; *Benjamin v. McConnell*, 9 Ill. 536; *Vandever v. Clark*, 16 Ark. 331; *Taylor v. Galland*, 3 Ia. 17; *Booth v. Campbell*, 15 Md. 569; *Cornell v. Masten*, 35 Barb. 157; *Schwinger v. Raymond*, 83 N. Y. 192; *Barrett v. T. A. R. R. Co.*, 45 id. 628; *Woods v. Pangburn*, 75 id. 49; *Cockloft v. Muller*, 71 id. 367; 1 Story on Cont. § 566; *Bank of Poughkeepsie v. Ibbotson*, 5 Hill, 461; *Hoffman v. Dunlap*, 1 Barb. 185; Code Civ. Pro. § 3352.) The acceptance of an agreed sum from Moffat and the delivery to him of the release operated as an accord and satisfaction of the entire indebtedness. (*Arnold v. Camp*, 12 Johns. 409; *Frisbee v. Larned*, 21 Wend. 450; *People ex rel. v. B. C. Asylum*, 96 N. Y. 640.) The failure to issue an execution against the executor, Frederick Hood, on the surrogate's decree is fatal to this action. (Code Civ. Pro. § 2607; *Place v. Hayward*, 117 N. Y. 487; 100 id. 219; *Hood v. Hood*, 85 id. 561, 574; *Haight v. Brisbin*, 100 id. 219; *Alexander v. Bryan*, 110 U. S. 114.) The court erred in allowing interest against the defendant from the time of the revocation of the letters testamentary of Frederick Hood. (*Clark v. Bush*, 3 Cow. 151-155; Code Civ. Pro. § 1915; *Beers v. Shannon*, 73 N. Y. 273, 302; *O'Brien v. Young*, 95 id. 428; *Sanders v. L. S. & M. S. R. R. Co.*, 94 id. 641.) But if the statute can be disregarded, interest certainly cannot be allowed from a period anterior to the decree on the accounting. (*Hood v. Hood*, 85 N. Y. 561; *Haight v. Brisbin*, 100 id. 219; *Alexander v. Bryan*, 110 U. S. 414; *Mansfield v. N. Y. C. & H. R. R. R. Co.*, 114 N. Y. 331.) The respondent, as co-executrix, being a joint tort-feasor with Frederick Hood, cannot in this action recover the full penalty of the bond. (*Nanz v. Oakley*, 37 Hun, 495; *Earle v. Earle*, 95 N. Y. 104-117, 403; *In re Rugg*, 24 Wkly. Dig. 374; *Laroe v. Douglas*, 2 Beav. 308; *Schwell v. Schenck*, 1 C. E. Green, 181; *In re Niles*, 113 N. Y. 547, 556.) No reply or demurrer having been interposed to the counter-claim the defendant was entitled to judgment thereon. (Code Civ. Pro. §§ 301, 522; *Randolph v. Mayor, etc.*, 53 How. Pr. 68; *Matton v. Baker*,

Opinion of the Court, per BRADLEY, J.

24 id. 329; *Prouty v. Eaton*, 14 Barb. 309; *Wilder v. Boynton*, 62 id. 547; *H. S. B. Co. v. L. I. Co.*, 48 id. 355; *Coffin v. McLean*, 80 N. Y. 560.) The surrogate not having had jurisdiction at the time the bond was executed, to direct the payment of the money to the respondent, or to entertain on her application the proceedings which resulted in the decree, no action lies thereon against the appellant. (Code Civ. Pro. 2514, 2724; *Annett v. Kerr*, 2 Robt. 556; *Nanz v. Oakley*, 37 Hun, 495.) The bond not having been assigned to the plaintiff as executrix, or an order made permitting her to sue prior to the commencement of this action, it cannot be maintained. (*Farish v. Austin*, 25 Hun, 430; *Schofield v. Doscher*, 72 N. Y. 491; 18 Abb. [N. C.] 149.) The wrongful investment on which the decree of July, 1885, is based, was not made by Frederick Hood as executor, but as trustee, for which appellant is not liable. (*Bailey v. Bailey*, 28 Hun, 603; *Hurlburt v. Durant*, 88 N. Y. 121; *Marks v. McGlynn*, Id. 375; *Laytin v. Davidson*, 95 id. 263.) The six years Statute of Limitations is a bar to this action. (*Shutts v. Fingar*, 100 N. Y. 530; *Clark v. Ford*, 1 Abb. Ct. App. Dec. 359; *Drake v. Wilkie*, 30 Hun, 537; *Pierson v. McCurdy*, 1 Cent. Rep. 175; *Burt v. Myers*, 37 Hun, 287-290; *Myers v. Budlong*, 70 N. Y. 542-559; *Foote v. Farrington*, 41 id. 164; *Drake v. Wilkie*, 30 Hun, 537; *Trinity Church v. Vanderbilt*, 98 N. Y. 170.) The court erred in permitting proof of alleged acts of misconduct by the executor. (*Haight v. Brisbin*, 100 N. Y. 219; *Hood v. Hood*, 85 id. 561; *People v. Barnes*, 12 Wend. 492; *Annett v. Kerr*, 2 Robt. 563.) Appellant's rights as surety being *strictissimi juris* no loose interpretation of the legal questions will be indulged in. (*Ward v. Stahl*, 81 N. Y. 406.)

BRADLEY, J. In 1864 the will of Andrew Hood, deceased, was admitted to probate, and letters testamentary were issued to the plaintiff and the defendant Frederick Hood; and the latter being a non-resident of this state, gave bond in which the defendant Hayward and David Moffat joined as sureties.

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The executor Hood was afterwards charged with devastavit, and in 1883 his letters were revoked. On July 31, 1885, in a proceeding before the surrogate, instituted by petition of the plaintiff, a decree was made directing him to pay to her as such executrix the sum of \$31,100. This action was afterwards brought upon such bond. And the objection is taken that it cannot be maintained, because no execution was issued upon such decree and returned wholly or partially unsatisfied. The disposition of this question is dependent upon the statute by which such remedy is regulated. (Code Civ. Pro. §§ 2607, 2608, 2609.) Those sections provide for three classes of actions upon the official bond of executors and administrators: 1. Where an execution issued upon a surrogate's decree against the property of an executor or administrator has been returned wholly or partly unsatisfied, an action to recover the sum uncollected may be maintained upon such bond by and in the name of the person in whose favor the decree was made. (§ 2607.) 2. Where letters have been revoked, the successor of the executor or administrator, whose letters are revoked, may maintain an action upon his predecessor's bond, in which he may recover any money or the value of any other property received by the principal and not duly administered by him, and to the full extent of any injury sustained by the estate of the decedent. And the money recovered is regarded as part of the estate in the hands of the plaintiff, and must be distributed or otherwise disposed of accordingly. (§ 2608.) 3. Where the letters are so revoked and no successor is appointed, any person aggrieved may, upon obtaining leave by order of the surrogate so to do, maintain an action on the bond in behalf of himself and all others interested. And the money so recovered must be paid into the Surrogate's Court for distribution. (§ 2609.)

These are distinct remedies, and each of them is independent of the others. They were designed to take the place of those given by prior statutes on the subject. Formerly the right to bring actions on such bonds was subject to the direction of the surrogate, or was dependent in the case provided

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for it, of an assignment by him of the bond to the person in whose favor a decree was made. When an executor or administrator refused or omitted to perform a decree made against him for rendering an account or upon final settlement, the surrogate might cause the bond to be prosecuted. (L. 1830, ch. 320, § 23; 2 R. S. [2d. ed.] 53, § 19.) The provisions of section 2607 are substituted for section 65, chapter 460, Laws of 1837, which provided that after the return of an execution unsatisfied, the person in whose favor the decree upon which it issued was made, might have a right of action upon assignment of the bond to him by the surrogate. The present statute dispenses with the formal act of assignment. And the provisions of sections 2608 and 2609 seem to be somewhat broader in their import than were those of the former statute which provided for the prosecution of the bond of an executor or administrator whose letters had been revoked. Then it was done by the direction of the surrogate. (2 R. S. 85, § 21.) The actions under such prior statutes other than that of 1837, were prosecuted in the name of the People. Those statutes are referred to in view of the proposition before asserted, that the present remedies are distinct and independent of each other as were those formerly existing. (*People v. Guild*, 4 Denio, 551.)

The support of an action under section 2607 is dependent upon the return of an execution unsatisfied. That is not requisite for the purpose of actions within the provisions of the two sections following it. This action does not come within section 2609. The question arises whether it is supported by the provisions of section 2608. And that is mainly dependent upon the fact whether the plaintiff is the successor of the one whose letters were revoked. When her associate was retired from it, the entire trust was devolved upon her. She succeeded to and necessarily assumed all the powers and duties with which he had been vested and charged as an executor, and in that sense she was his successor. There is apparently no reason for denying to her that relation, for the purposes of the remedy in view, unless the statute requires a con-

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struction which defeats it. The purpose of the statute giving the right of action to the successor of an executor or administrator whose letters are revoked, is to indemnify the estate of the decedent against loss so far as the means afforded by the official bond of the defaulting representative and the remedy founded upon it will permit. It not only seems that the appointment, if authorized, of a successor to the one of two whose letters have been revoked, would be useless for the accomplishment of that purpose, but such supply of another in that manner in his place is not permitted, except when necessary to comply with the express provisions of a will. The statute contemplates that, except in such case the survivor will perform all the duties of the trust. (Code, § 2692.) And, with that exception, it is only when all the executors or administrators die or become incapacitated, or the letters of all of them are revoked that letters will be granted to one or more persons as their successors. (Id. § 2693.) It follows that unless the survivor may be treated as a successor within the meaning of the statute, the provisions of section 2608 cannot be made applicable to an action upon the bond of one of two or more executors or administrators whose letters have been revoked; and that the remedy upon his bond when there is a survivor, is dependent solely upon the provisions of section 2607. That section provides for an action by the person in whose favor is made a decree against an executor or administrator after the return of an execution unsatisfied. The decree in the present case was not against such an officer, but was made pursuant to the statute providing that, upon the petition of the successor, or of the remaining executor or administrator, the surrogate may compel the *person* whose letters have been revoked to account for or deliver over money or other property, and to settle his account. (Id. § 2605.) It has, however, been held in *Sperb v. McCoun* (110 N. Y. 605) that in such case an action may be maintained, under section 2607, when an execution has been issued on such decree and returned unsatisfied. It does not follow, from the determination of that case, that the present one cannot be supported. Nor does the view

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in that case necessarily preclude the application of the provisions of section 2608 to the cause of action alleged in this case, and to its determination by the trial court as represented by its findings of fact. For the purposes of an action upon the bond of an executor whose letters have been revoked, the issue of execution upon a decree and its return unsatisfied are not requisite to its maintenance. Nor does the application of the provisions of the statute in that respect seem by its terms or by reasonable implication to be confined to those cases where no survivor remains to proceed with the execution of the trust; and in that view, inasmuch as the statute imposes its performance wholly upon the latter, the remedy upon the official bond of him whose letters are revoked is entirely with such survivor. And to hold that the latter is not a successor within the meaning of the statute, is to deny any remedy under the provisions of the section last mentioned. No definition of the term "successor" is given in the statute. There is in other sections of it upon the subject under consideration some language used importing its application to a person who receives an appointment in place of one who has been retired from the position of trust. But it is not so restricted by anything in section 2608. And, although by a process of reasoning the application of some provisions of other sections may be so made as to give to the word successor such restricted meaning, that construction is not within the evident spirit and purpose of the statute. The view here taken is that when the plaintiff became the sole remaining executor, she, for all the purposes of the trust, was the successor of the one who had been removed, as she succeeded to all the powers before then vested in him in his relation to the estate of the decedent, as effectually as they could be taken by one appointed in his place, if such appointment were permitted and had been made. And this action was brought solely for the benefit of the estate, to bring to it a fund to reimburse it *pro tanto* for the loss it had suffered by the breach of trust of the principal in the bond while he was executor, and in violation of the order of the surrogate. Such money, when collected, is part of the estate and to be dis-

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tributed and disposed of under the direction of the surrogate. That is the purpose of an action and recovery under section 2608. And these views lead to the conclusion that this action is within the provisions of that section.

In respect to the other questions, the conclusions of Judge POTTER are adopted to the effect that the release of Moffat did not discharge the defendant Hayward from his liability to the extent of a moiety of the obligation assumed by those persons upon the bond; and that the plaintiff was entitled to recover interest only from July 31, 1885.

The judgment should, therefore, be modified by deducting from the recovery interest upon \$10,000 from December 7, 1883, to July 31, 1885, and as so modified affirmed.

POTTER, J. (dissenting). The decision of the main appeal involves two questions: Whether the instrument executed and delivered by the plaintiff and the legatees, under the will of Andrew Hood, to Moffat, one of the sureties upon the bond given by the executor, discharged the liability of the defendant Hayward, the other surety upon said bond, and whether this action upon said bond against the defendant Frederick Hood as principal and the defendant Hayward, as surety can be maintained before the issuance and return of an unsatisfied execution against the property of said Frederick Hood, the executor.

These propositions are familiar law and scarcely need the citation of authorities to support them, viz., that the release of the liability of one or more joint or joint and several obligors, or one or more joint tort feors, discharges the liability of the other; that the rule is the same in law and equity.

But these rules require for their full operation that the instrument should be a technical release without any valid limitation or restriction. The contention in this case is as to the character of these instruments. Whether they constitute a technical and absolute release, or whether they constitute a release with a valid limitation, or, as more practically stated, whether they release the liability of the surety Moffat and

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reserve the liability of the surety Hayward upon the bond, or whether they discharged the liability of both Moffat and Hayward upon the bond.

A reference to the instruments under consideration shows that the plaintiff, as executrix and individually, together with all the devisees and legatees under the will of Andrew Hood, deceased, in consideration of \$7,000, to them paid by said Moffat, released and discharged him, his heirs, executors, administrators and assigns from all causes of action, etc., and especially by reason of the said Moffat having executed with one John Hayward and Frederick Hood a joint and several bond to the People of the State of New York in the sum of \$20,000, executed by said Hood as principal, and by the said Moffat and Hayward as sureties. The said instrument further provides that this release is intended to discharge said Moffat from all liability by reason of said bond in every respect, "but shall not be construed as affecting any claim or demand which the parties of the first part, or any of them, have or may have against the said Frederick Hood as executor, or against the said John N. Hayward as surety on said bond or otherwise."

The same parties, in addition to signing the instrument, the substance of which is above stated, also executed and delivered to said Moffat another instrument which provided "that it was intended thereby to release and discharge the said Moffat, his heirs, executors and administrators from all liability whatever of any kind and nature arising or growing out of any and all acts or omissions, neglect or defalcation of the said Frederick Hood, whether done or committed as executor, trustee, or in any other capacity, under said last will and testament of Andrew Hood, deceased, or otherwise, but that said release should not be construed as in any way affecting any claim or demand which they (the parties of the first part thereto), or any of them, had or might have against the said Frederick Hood as such executor or otherwise, or against the said John Hayward as surety on said bond or otherwise."

"Now it is hereby declared that the intention of said parties is to release the said David Moffat from any and all claims

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which they, or any of them, have or might have against him, his heirs, executors or administrators under or by virtue of said bond, to the extent of one-half of the penalty thereof, and it is expressly understood and agreed that the said release is intended to operate as a satisfaction and discharge of one-half of the obligation arising from or under said bond, so that the said Moffat shall be released from all claim or demand for contribution on the part of his co-surety, the said John N. Hayward, and that this instrument shall be taken and deemed a part of said release and incorporated therein."

"It is also understood and agreed that nothing therein contained shall in any manner affect or impair any claim, right or demand which the parties thereto, or any of them, their, or any of their, heirs, executors or administrators have or may hereafter have against the said Frederick Hood or as against John N. Hayward as to the remaining half of the amount of said bond."

The evidence in the case shows, beyond question and without substantial contradiction, that these two instruments were delivered to Moffat at the same time and upon the occasion of the payment and receipt of the consideration specified in them.

The trial court has found as a conclusion of fact "that David Moffat, mentioned in said bond, has been released from any liability on said bond to the extent of one-half the penalty thereof, to wit, the sum of ten thousand dollars, saving and reserving however, and excepting all cause or causes of action against the defendants in this action and any and all liability thereunder." And, as conclusion of law, that the plaintiff, as executrix, is entitled to judgment against the defendant Hood, the executor, and the defendant Hayward, one of the sureties, for the sum of \$10,000 (that sum being one-half of the penalty of the bond) with interest.

The defendant Hayward contends that he was released from all liability upon the bond by the release of the liability of Moffat.

There is no doubt that if the language of the instruments had simply acknowledged satisfaction of all claims arising

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upon the bond and released and discharged the same, the effect would have been to discharge both Moffat and the defendant Hayward from any further liability upon the bond. But the language of the instrument acknowledges the payment of the sum of \$7,000, being less than one-half of the penalty of the bond, from Moffat, and purports to discharge Moffat only, and expressly declares such to be its sole object and purpose, and that it shall not be construed as in any way affecting any claim or demand which the releasors have against Hood, as executor, or the defendant Hayward, as surety upon said bond; and in order to make this purpose more manifest and its effect more certain, they executed on a later day and delivered with the instrument just referred to another instrument of an equal degree of dignity and solemnity declaring that it was their intention that said instrument should "operate as a satisfaction and discharge of one-half of the obligation from or under said bond, so that said Moffat shall be released from all claim or demands for contribution on the part of his co-surety, the said John N. Hayward," and "that nothing therein contained should in any manner affect or impair any claim, demand or right which they have or may have against said Frederick Hood, or as against John N. Hayward as to the remaining half of the amount of said bond."

It will be observed that the terms of the instrument do not express that the claim or liability under the bond has been satisfied, which is the essential point in an accord and satisfaction. The terms of the discharge by the instrument expressly limit the operation of the discharge to Moffat and reserve the liability of Hayward. I do not perceive any reason in the relations of the parties to this bond, as between themselves or as to the releasors to prevent the court from giving the precise effect to the instrument intended by the parties to it. Each of the sureties was liable to the releasors for the full amount of the penalty and whatever part of the penal sum either should be compelled to pay, he could compel his co-surety to contribute one-half. Aside from interest neither surety could compel the other to contribute more than one-half of

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the penalty of the bond, viz.: \$10,000, whatever the loss of the estate may have amounted to.

In this case it amounted to much more than the amount of the penalty, so that the releasors could have demanded each surety to pay \$10,000. That is the sum which defendant Hayward was liable to pay under the bond, to the releasors, and that is all he is now compelled by the judgment to pay them. What harm or prejudice has or would have been done Hayward in this case, if the releasors had forgiven the liability of Moffat outright or had received \$10,000 of Moffat's money and subsequently given it back to him? I can perceive none. Certainly, Hayward could not have sued and recovered of Moffat any part of such gift. The contractual relation between co-sureties is that each shall pay one-half of the amount of the liability assumed. There is no other contractual relation between them; certainly none that entitles one surety to share in the voluntary benefits or presents that the obligee may make the other surety. The question in this case is whether the release to Moffat discharged Hayward. What (if any) rights and remedies Hayward may have against Moffat in any contingency that may arise, need not here be considered.

But without further discussing the reasonableness of the respondent's contention, we think there is an unbroken line of decisions supporting the judgment in this case, to the effect that the defendant Hayward was not discharged by virtue of the instrument which discharged Moffat from liability, upon the bond in suit.

It is not worth while to refer to but few of the numerous cases which maintain this view. (*Benedict v. Rea*, 35 Hun, 34; *Irvine v. Millbank*, 56 N. Y. 635; *Morgan v. Smith*, 70 id. 537; *Bronson v. Fitzhugh*, 1 Hill, 185; *Kirby v. Taylor*, 6 Johns. Ch. 246; *Matthews v. Chicopee Mfg. Co.*, 3 Rob. 711; *Ellis v. Esson*, 50 Wis. 138; 36 Am. Rep. 830; *Price v. Barker*, 4 Ellis & Black, 760; *Thompson v. Lack*, 3 Com. Bench R. 540.)

The great number of decisions and the discussion in the opinions of the courts upon this branch of the law has arisen,

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as it seems to me, not from any doubt or diversity of opinion in relation to the effect of an instrument under seal clearly expressing a discharge of one joint obligor in consideration of a sum less than the entire obligation or liability and a reservation of the remainder of the liability against the other obligor, but from a construction of the nature and effect of the various agreements and transactions between one or more joint obligors with the obligee, whether the agreement or transaction shall be held as a full satisfaction of the obligation as to all the obligors or a satisfaction in part and a release of less than all the obligors, or a covenant not to sue one or more of the obligors or whether the instrument affords a presumption of a full satisfaction and discharge of the obligation or whether sufficient in force and dignity to discharge the original obligation. The acts of the legislature from time to time, and as expressed in section 1942, Code of Civil Procedure, are in line with the decisions as respects joint debtors, and under it the presumption is that only the compromising creditor is discharged.

Of the correctness of the decision of the court below in respect to the office and effect of the instrument given to Moffat by the obligees or beneficiaries of the bond I think there can be no doubt.

The next question to be considered relates to the remedy by which the plaintiff seeks to maintain her right against Hayward. The general rule is that a party must resort to a remedy prevailing at the time the action is commenced to enforce his right. The defendant contends that it was necessary before bringing this action to recover against the surety upon an executor's bond, that the proper surrogate should have made a decree against the executor, and that an execution should have been issued to collect the sum specified in the decree, and that the execution should have been returned unsatisfied in whole or in part.

It is found by the trial court that no such execution had been issued or returned. It will also be borne in mind that

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the proper surrogate had made a decree or order directing the executor Hood to pay the plaintiff the sum of \$29,100, on account of a loss through mismanagement and revoking his appointment as executor and later made an order granting leave to sue the bond.

"In all the cases of actions on bonds of executors and administrators, a compliance with the statutory formalities has been regarded as essential to the maintenance of an action against the sureties." (*Hood v. Hood*, 85 N. Y. 561-574.) All the statutory prerequisites for the commencement of actions upon the bonds of executors and administrators were abolished by chapter 245 of the Laws of 1880, and the provisions contained in the Code of Civil Procedure were adopted in their stead. The orders or decrees of the surrogate revoking the letters testamentary to Frederick Hood, and directing the payment of the sum of \$29,100, the loss by his misconduct to the estate of the testator to the plaintiff, and granting leave to her to bring an action upon the bond were made subsequent to the change of the laws relating to the bringing of actions upon such bonds. The laws applicable to that subject are to be found in sections 2607, 2608 and 2609 of Code of Civil Procedure. Section 2607 provides "Where an execution issued upon a surrogate's decree, against the property of an executor, administrator, testamentary trustee or guardian has been returned wholly unsatisfied, an action to recover the sum remaining uncollected may be maintained upon his official bond by and in the name of the person in whose favor the decree was made. If the principal debtor is a resident of the state the execution must have been issued to the county where he resides."

This section manifestly embraces all cases where an order or decree is made by the surrogate for the payment of money by the executor or administrator as formerly existed under the provisions of the Revised Statutes and chapter 460 of the Laws of 1873, and perhaps other statutes upon that subject.

The proceeding under this section is based upon a judgment or decree against the executor or administrator for the payment

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of money and the issuing of an execution for its enforcement and the failure of its accomplishment before an action can be brought upon the bond of his sureties. Under that provision it is not now requisite that an order be made by the surrogate granting leave to prosecute the bond or assigning the bond for that purpose.

It is sought to obviate this objection and to maintain the action upon section 2608, which provides that "where letters have been revoked by a decree of the Surrogate's Court, the successor of the executor, administrator or guardian, whose letters are so revoked, may maintain an action upon his predecessor's official bond, in which he may recover any money, or the full value of any other property, received by the principal in the bond, and not duly administered by him; and to the full extent of any injury sustained by the estate of the decedent, or of the infant, as the case may be, by any act or omission of the principal. The money recovered in such an action is regarded as part of the estate in the hands of the plaintiff, and must be distributed or otherwise disposed of accordingly; except that a recovery for an act or omission, respecting a right of action, or other property appropriated by law for the benefit of the husband, wife, family or next of kin of a decedent, or disposed of by a will for the benefit of any person, is for the benefit of the person or persons so entitled thereto."

But it seems to me that cannot be done with a proper regard of the plain language of the provision and scheme contained in sections 2607, 2608 and 2609.

As before stated, section 2607 does and is intended to embrace *all* cases where there is a decree against the executor for the payment of money. The money is to be collected by the ordinary process of execution, if practicable, before resort can be had to the bond of the sureties. In this case, the basis of the action is the decree which plaintiff (after revocation of the letters to her co-executor, Frederick Hood) had been granted, and such decree was the only evidence of the loss which the estate had sustained, and was the measure of such loss. Section 2608 has application only to a different class of

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cases, to cases where the letters have been revoked by the surrogate, as to all executors or administrators, and where a successor has been appointed, and section 2609 to a case where the letters have been altogether revoked and no successor has been appointed. The language used and the scheme of those sections forbid such a construction of them.

A successor is one who follows another into a position, and not one who went into the position with and survives such other in the position after it has been vacated by such other. Other sections of the Code are only consistent with this construction of sections 2608 and 2609. Section 2605 provides, “* * * the successor may complete the execution of the trust committed to his *predecessor*.” “The Surrogate’s Court has the same jurisdiction upon the petition of the successor, or of a *remaining* executor * * * to compel the person whose letters have been revoked to account * * *” as was done in this case.

It is provided by section 2692: “Where one of two or more executors or administrators dies, or becomes a lunatic, or is convicted of an infamous offense, or becomes otherwise incapable of discharging the trust reposed in him; or where letters are revoked with respect to one of them, a successor to the person whose letters are revoked shall not be appointed, except where such an appointment is necessary in order to comply with the express terms of a will, but the others may proceed and complete the administration of the estate, pursuant to the letters, and may continue any action or special proceeding brought by or against all.”

And by section 2693 it is provided that: “When all the executors or all the administrators, to whom letters have been issued, die or become incapable, as prescribed in section two thousand six hundred and ninety-two, or the letters are revoked as to all of them, the surrogate must grant letters of administration to one or more persons as their successors in like manner as if the former letters had not been issued; and the proceedings to procure the grant of such letters are the same, and the same security shall be required as in case of intestacy,

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except that the surrogate may, in his discretion, in case where the estate has been partially administered upon by the former representative or representatives, fix as the penalty of the bond to be given by such successor or successors, a sum not less than twice the value of the assets of the estate remaining unadministered."

Besides the tenor and design of section 2608 prescribe what is to be done by the successor. A surviving executor is already charged with those duties, and there is no occasion to re-charge him. Section 2609 is intended for a case where the letters have been revoked and no successor has been appointed. In the latter case any person aggrieved may obtain from the surrogate leave to prosecute the bond given by the executor whose letters have been revoked, and the duties cast upon such person are conferred in the same language as the duties cast upon the successor under section 2608. And it may be remarked, in considering section 2609, that *it* alone presents a case where the surrogate has any occasion to grant leave to sue the executor's bond under existing laws.

I am reluctantly constrained to the conclusion that the omission to issue execution upon the decree against the executor is fatal to the maintenance of this action against the defendant Hayward, surety upon the bond in suit, for I have an impression that the issuing of an execution against the executor Hood, a non-resident of this state, would have proven a fruitless ceremony.

If the conclusion in relation to the objection that an execution should have been issued and have been returned unsatisfied in order to maintain this action, is correct, the appeal must result in a new trial, and there is not any necessity or perhaps occasion to discuss the question of the amount of interest involved in the cross-appeal. But as I have discussed the question of the effect of the release of Moffat, notwithstanding my conclusion that a new trial is necessary, it may not be amiss to indicate, but without deciding it, the impression of the court upon the subject of the extent of the interest recoverable upon the bond of the surety in suit.

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As it appears from the case that the letters of the executor Frederick Hood were revoked December 27, 1883, and the court below has allowed interest upon \$10,000, one half of the penalty of the bond and the limit of Hayward's liability, I am of the opinion that the allowance of interest from that date was erroneous. The decree revoking the letters did not necessarily or judicially determine the amount or extent of the loss to the estate arising from the misconduct of the executor whose letters were revoked.

A revocation of letters may be granted for various grounds of misconduct of the executor, and among those grounds are investments made by him in securities not authorized by law or in violation of the decree or order of the surrogate, and regardless of the sum so misinvested. (Code of Civil Procedure, § 2865.)

It appeared, incidentally, from the order of revocation that the executor has misinvested at least the sum of \$29,100 of the sum of \$53,710.69 which he was directed to invest by the decree of the surrogate dated January 6, 1869. Upon an accounting by the executor subsequent to the decree revoking his letters, upon the petition of the plaintiff as executrix praying for an accounting for the moneys received by him on the 31st day of July, 1883, "whereby, among other things, he disallowed the said investment of twenty-nine thousand one hundred dollars, and ordered and directed that such sum together with the further sum of \$2,675, amounting in all to the sum of thirty-one thousand seven hundred and seventy-five dollars, be paid by said Hood to the plaintiff."

This is the period at which the amount of the loss to the estate by the misconduct of the executor and the liability of the defendant, as his surety, was adjudicated, and the executor was on that day directed by the order of the surrogate to pay the amount to the plaintiff.

The executor upon demand of payment of that sum failed to pay it or any part of it. It seems to me very plain upon principle that the interest should begin to run from the date of the last-named decree.

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On that day for the first time was the breach of the bond adjudicated and the amount of damages resulting therefrom liquidated. (*Mansfield v. N. Y. C. & H. R. R. Co.*, 114 N. Y. 331.)

While there was formerly some contrariety of decisions in respect to allowing interest to be added to the penalty of a bond, or more accurately speaking, of allowing the damages to be added to the penalty for withholding it after it was due, I think now it may be regarded as settled law that interest or damages may be added to the penalty from the date at which it is determined there has been a breach of the condition of a bond.

In case the condition of the bond is the payment of money on a day certain, the interest or damages will begin to run from that date, and in case the condition of the bond is that an act shall be performed, the interest or damages will begin to run from the date that it is adjudicated by a competent court that the act has not been performed, and liquidating and fixing the damages caused by such non-performance. The bond in suit belongs to the latter class. It is necessary in this class of bonds that the complaint should allege the act that was not performed, prove the allegation and the damages occasioned thereby. (*Beers v. Shannon*, 73 N. Y. 292-302.)

The decree was the evidence of all this and the equivalent of a bond conditioned to pay a particular sum of money upon a day certain, and this court has held that an action cannot be maintained against the surety upon an executor's bond until an accounting has been had and a decree rendered. (*Hood v. Hood*, 85 N. Y. 561; *Haight v. Brisbin*, 100 id. 219.)

When the amount of the liability in money has been fixed by the decree, it becomes a debt and like a bond conditioned to pay a specific sum of money, and the withholding of its payment will create a liability to pay the damages estimated by law to be equal to the legal rate of interest (*Williams v. Willson*, 1 Vt. 266; *Perit v. Wallis*, 2 Dall. 252; *Carter v. Carter*, 4 Day, 30; 2 Am. Dec. 113; *Smedes v. Hooghtailing*, 3 Caines, 48; 2 Am. Dec. 250; *Brainard v. Jones*, 18 N. Y.

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35; *United States v. Arnold*, 1 Gall. 348; *Harris v. Clap*, 1 Mass. 307; 2 Am. Dec. 27; *Wyman v. Robinson*, 73 Me. 384; 40 Am. Dec. 360), and I think it was upon this theory of the law that section 1915 of the Code of Civil Procedure was adopted upon this subject.

My conclusion is, therefore, that if *plaintiff* is entitled to recover in this action, she can only recover, besides the one-half of the penalty, damages or interest from the date of the decree, which was July 31, 1885, and this difference may, upon this appeal, be deducted and the judgment corrected if the views in relation to the necessity of issuing execution are not concurred in.

A brief consideration of the defenses of counter-claim and the Statute of Limitations will suffice.

The action is brought by plaintiff, as executrix, a trustee. The alleged counter-claim sets forth no facts except, possibly, the fact that the plaintiff, as such executrix, acted with Hood, executor, in the management of the assets and property of the estate, and the legal conclusion therefrom that she is jointly liable with the executor for loss and waste.

It is not alleged in the counter-claim that the respondent ever had any individual interest in the estate, or if she had, that it continued to exist at the time the loss was made by the investment.

As executrix and trustee for others, she may maintain this action notwithstanding any complicity with the misconduct of the executor, and any cause of action against her individually cannot form a counter-claim against her as the trustee for others. (*Wetmore, as Exr., v. Porter*, 92 N. Y. 76; *Sperb v. McCoun*, 110 id. 605; *Boyle v. St. John*, 28 Hun, 455; Subd. 3, § 502, Code Civ. Pro.)

The reply seems to me wholly inconsequential, and would not constitute a defense or a basis for affirmative relief if it was admitted for want of a demurrer or reply to be true, for the omission to demur or reply will not impart a cause of action or a defense where none was contained in the preceding pleading.

Statement of case.

But in this case the trial court refused to find, upon defendant's request, that the plaintiff had any possession of the fund or any knowledge of its investment until after the loss had been incurred, and the evidence in the case was such as to make such refusal necessary.

If the view I have taken above of the time when the cause of action matured and the defendant became liable to pay interest upon one-half of the penalty named in the bond is correct, that disposes of the defense of the Statute of Limitations.

I think the judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur with BRADLEY, J., except POTTER, J., dissenting, and FOLLETT, Ch. J., not voting.

Judgment modified and, as modified, affirmed.

JOHN HARDMAN et al., Appellants, v HENRY W. SAGE et al.,
Respondents.

The year within which, under the provisions of the General Manufacturing Act (§ 24, chap. 40, Laws of 1848), an action must be begun for the recovery of a debt owing by a corporation organized under it, so as to lay a foundation for a recovery against a stockholder under the provision (§ 10) making stockholders liable for the debts of the corporation until the whole capital stock has been paid in and a certificate as prescribed filed, begins to run on the day when the debt first became due. If, therefore, the time of the payment of a debt is extended by the taking of a promissory note, which is sued within a year from the date of its maturity, but more than a year after the debt became due, the claim of the creditor against the stockholders is lost and they cannot be charged with the payment of the debt.

Under the provision of said act (§ 11), which requires a certificate to be made within thirty days after the payment of the last installment of the capital stock, stating the amount of the capital as fixed and paid in, "which certificate shall be signed and sworn to by the president and a majority of the trustees," in order to release the stockholders

124	25
143	514
124	25
145	95
124	25
146	58
124	25
147	612
124	25
152	124
124	25
153	505
124	25
155	156

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from liability, the certificate must be sworn to; an acknowledgment, without verification, is not sufficient.

Handy v. Draper (89 N. Y. 335); *Rocky Mountain Nat. Bank v. Bliss* (89 id. 338), distinguished.

Reported below, 47 Hun, 230.

(Argued October 28, 1890; decided January 14, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made January 23, 1888, which reversed a judgment in favor of the plaintiffs entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Joseph Ullman for appellants. The defendants are liable under the Manufacturing Act (§ 10, chap. 40, Laws of 1848), if the conditions of section 24 were complied with, or if their performance was excused. (*Veeder v. Mudgett*, 95 N. Y. 295; *Blake v. Wheeler*, 18 Hun, 496, 500; *Bonnell v. Griswold*, 80 N. Y. 128, 139; *W. A. Co. v. Barlow*, 63 id. 62, 66; *O'Reilly v. People*, 86 id. 154, 161; *Case v. People*, 76 id. 242; *Deming v. Puleston*, 55 id. 655; *Van Amburgh v. Baker*, 81 id. 46.) Compliance with the provisions of section 24 requiring suit, judgment and execution against the company, is excused, when it becomes impossible by act of the law. (*Shellington v. Howland*, 53 N. Y. 371; *Kincaid v. Dwinelle*, 59 id. 548; *Cuykendall v. Corning*, 88 id. 129, 137; *Flash v. Conn*, 109 U. S. 371; *Miller v. White*, 50 N. Y. 137; *McMahon v. Macy*, 51 id. 155.) The debt of the company to the plaintiffs became due within a year prior to its dissolution, even if it be conceded that the notes sued on are renewals of former indebtedness. (*Corning v. McCullough*, 1 N. Y. 47; *Wiles v. Suydam*, 64 id. 173; *Cochran v. Wiechers*, 119 id. 300; *Richmond v. Iron*, 121 U. S. 27; *Garrison v. Howe*, 17 N. Y. 458; *W. A. Co. v. Barlow*, 68 id. 34; *Jones v. Barlow*, 62 id. 202; *Handy v. Draper*, 89 id. 334; *Veeder v. Mudgett*, 95 id. 295.) The so-called Spargo note was not a renewal or extension of an old obligation, but

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the indorsement or guaranty thereof by the company created a new debt. (*Shaw v. R. L. Ins. Co.*, 69 N. Y. 286; *Pratt v. Cowan*, 37 id. 440; *J. I. Co. v. Walker*, 76 id. 525.) The conclusions of the learned referee may be sustained on another ground, viz., that the notes mentioned in the complaint were not renewals or extensions of prior debts, but were independent transactions and themselves represented or created new indebtedness. It is immaterial that this was not the view taken by the referee. (*Arnot v. E. R. Co.*, 67 N. Y. 315; *McCormick v. P. C. R. R. Co.*, 80 id. 362; *Ahern v. Goodspeed*, 72 id. 117; *Everson v. City of Syracuse*, 100 id. 577; *Slattery v. Schwainnecke*, 118 id. 543; *Rothschild v. Mack*, 115 id. 1; *Larkin v. Hardenbrook*, 90 id. 333; *Wood v. Rabe*, 96 id. 420; *Loncey v. Clark*, 64 id. 209; *Burr v. Smith*, 21 Barb. 262; *Eastman v. Plumer*, 32 N. H. 238; *Kennedy v. Chapin*, 67 Md. 454; *Greening v. Patten*, 51 Wis. 146; *Citizens' Bank v. Lay*, 80 Va. 436; *Dooley v. Ins. Co.*, 3 Hughes, 221; *Cameron v. Tome*, 64 Md. 507; *Hoyt v. Cross*, 108 N. Y. 76; *M. N. Bank v. Sirrett*, 97 id. 328, 329; *Dunham v. Cudlipp*, 94 id. 135; *People v. Ryan*, 10 Abb. [N. C.] 37; *United States v. Isham*, 17 Wall. 496.)

Thomas G. Shearman for respondent. The plaintiffs were not entitled to recover in this action against these defendants, as stockholders in the Ithaca Organ Company, unless the debt sued upon was to be paid within one year from the time that it was contracted, nor unless a suit for the collection of such debt was brought against the company within one year after it became due. (Laws of 1848, chap. 40, § 24.) The personal liability of the holder of stock in a manufacturing corporation cannot be kept alive beyond the term fixed by statute, by any extension of the credit originally granted to the corporation by the creditor who seeks to enforce the liability. (*Parrott v. Colby*, 6 Hun, 55; 71 N. Y. 597; *J. I. Co. v. Walker*, 76 id. 521; *Parrott v. Sawyer*, 87 id. 622.) If it were true that no due date was ever definitely fixed, then payment for the pianos in question would have been due immediately upon

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their delivery. It is ancient law, that where no time is fixed for the payment of money payment is due immediately. (*L. O. R. R. Co. v. Mason*, 16 N. Y. 451; *Purdy v. Phillips*, 11 id. 406; *Thompson v. Ketcham*, 8 Johns. 187; *Gibbs v. Southam*, 5 Barn. & Ad. 911.) The transactions detailed in the testimony do not create any new indebtedness, but were simply renewals of the prior indebtedness. Whatever form such transactions may assume, the court should look at the substance. (*J. I. Co. v. Walker*, 76 N. Y. 521; *Price v. Bank of Lyons*, 33 id. 55; *Walker v. Bank of Washington*, 3 How. [U. S.] 62; *In re Wilde*, 11 Blatchf. 243; *Vickery v. Dickson*, 35 Barb. 96; 62 id. 272; *Jackson v. Packard*, 6 Wend. 415; *Reed v. Smith*, 9 Cow. 648; *Tuthill v. Davis*, 20 Johns. 285; *Hill v. Beebe*, 13 N. Y. 556; *Gregory v. Thomas*, 20 Wend. 17; *Waydell v. Luer*, 5 Hill, 448; *Cole v. Sackett*, 1 id. 516; *Muldon v. Whitlock*, 1 Cow. 290.) If the theory of the referee had been correct, so that the plaintiff never had a right to sue the corporation until the extended time of payment arrived, under the contract, as modified by their extensions of notes at four months instead of sixty days, then the plaintiffs must fail in this case, because the debt would not have been payable within one year from the time it was contracted. (Laws of 1848, § 24; *Cox v. Gould*, 4 Blatchf. 341; *Bank of Geneva v. P. Bank*, 13 N. Y. 309; *Montford v. F. Bank*, 26 Barb. 568; *Central Bank v. E. S. Co.*, 26 id. 23; *F., etc., Bank v. E. S. D. Co.*, 5 Bosw. 275.) Even if it were true that a receiver of the property of the piano company was appointed, and the company was dissolved before the expiration of a year after the claims in suit became payable, yet this did not do away with the necessity of the plaintiffs exhausting their remedies against the company, as represented by the receiver before commencing this action. (*Williams v. Vanderbilt*, 29 Barb. 491; *Schillizi v. Derry*, 4 El. & B. 873; *White v. Mann*, 26 Hun, 368; *B. N. Bank v. Mosser*, 14 Hun, 605; *Mason v. N. Y. S. M. Co.*, 27 id. 307.) It does not appear that the stock which is held by the defendants is of such a nature as to subject them to any liability

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under this statute. Stockholders who have paid for their stock in any kind of property other than cash are not liable in an action of this kind; and it is for the plaintiff to prove affirmatively that the defendants are liable. (1 Greenl. on Ev. § 78; *Roberts v. Chittenden*, 88 N. Y. 33, 35; *Schenck v. Andrews*, 46 id. 589; *Brown v. Smith*, 80 id. 650; 13 Hun, 408.)

FOLLETT, Ch. J. This action was begun to recover from shareholders in the Ithaca Organ & Piano Company the amount due on four notes made by it, and the amount due on the note of a third person indorsed by the corporation, on the ground that the following section of the Manufacturing Act had not been complied with :

“§ 10. All the stockholders of every company incorporated under this act, shall be severally individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded as prescribed in the following (eleventh) section.”

May 19, 1877, the Ithaca Organ Company was duly incorporated under chapter 40 of the Laws of 1848, with a capital stock of \$25,000 divided into 500 shares of \$50 each, the affairs of which were to be managed by four trustees. No certificate stating the amount of the capital fixed and paid in was signed, sworn to and recorded as required by the eleventh section of the act. October 4, 1880, the capital stock was increased to \$125,000, the defendants under their firm name of H. W. Sage & Co. then becoming the owners of 400 shares of the new stock. Sixty two thousand five hundred dollars of the increase was paid in in cash and the remainder, \$37,500, by capitalizing the surplus earnings of the corporation. January 10, 1882, a certificate was recorded in the office of the clerk of the proper county, of which the following is a copy :

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"ITHACA, N. Y. *January 9th*, 1882.

"*To the Clerk of the County of Tompkins :*

"This is to certify that the capital stock of The Ithaca Organ Company limited and fixed in the sum of one hundred and twenty-five thousand dollars, was fully paid in on the 3d of January, 1882.

"WM. L. BOSTWICK.

"*President and Trustee.*

"P. F. SISSON, *Trustee.*

"H. WEGMAN, *Trustee.*

"STATE OF NEW YORK, }
 "*Tompkins County.* } ss.:

"On this 10th day of January, 1882, appeared before me, Wm. L. Bostwick, P. F. Sisson and H. Wegman, personally known to me, and each acknowledged for himself that the statement above was true to the best of his knowledge and belief.

"WILLIAM G. KING,

"*Notary Public.*"

On the 13th of March, 1882, the name of the corporation was changed from "The Ithaca Organ Company" to "The Ithaca Organ and Piano Company." On the 2d of January, 1883, the capital stock was again increased to \$215,000, the defendants under their firm name becoming the owners of 272 shares. The increase, \$90,000, was paid in partly in cash and partly by capitalizing the then existing surplus of the corporation. January 3, 1883, a certificate was made and recorded in the office of the clerk of the proper county, of which the following is a copy :

"*To the Clerk of the County of Tompkins :*

"This is to certify that the capital stock of The Ithaca Organ and Piano Company is limited and fixed in the sum of two hundred and fifteen thousand dollars, and was fully paid in on January 2, 1883.

"WM. L. BOSTWICK, *President.*

"WM. H. SAGE, *Trustee.*

"P. F. SISSON, *Trustee.*

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"STATE OF NEW YORK, }
"Tompkins County. } ss.:

"On this 3d January, 1883, appeared before me, Wm. L. Bostwick, P. F. Sisson and W. H. Sage, personally known to me, and each stated for himself that he executed the above instrument.

"WM. G. KING,
"Notary Public."

Section 11 of the act provides: "§ 11. The president and a majority of the trustees, within thirty days after the payment of the last instalment of the capital stock so fixed and limited by the company, shall make a certificate stating the amount of the capital so fixed and paid in, which certificate shall be signed and sworn to by the president and a majority of the trustees, and they shall, within the said thirty days, record the same in the office of the county clerk of the county wherein the business of the said company is carried on."

The certificates above quoted not having been sworn to but simply acknowledged, were not a compliance with the eleventh section (*Brown v. Smith*, 13 Hun, 408; affirmed, 80 N. Y. 650), and the liability of the owners of the new shares for the debts of the corporation under section 10 was not terminated. (*Vedder v. Mudgett*, 95 N. Y. 295.)

Was a judgment and an unsatisfied execution in an action begun against the corporation within one year after the debt became due for its recovery, necessary under the circumstances of this case, to enable the plaintiffs to maintain this action?

The twenty-fourth section of the act provides: "§ 24. No stockholder shall be personally liable for the payment of any debt contracted by any company formed under this act, which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within one year after the debt shall become due; and no suit shall be brought against any stockholder * * * until an execution against the company shall have been returned unsatisfied in whole or in part."

On the 24th of January, 1885, a final judgment dissolving

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the corporation was entered in an action brought by the People pursuant to article 1 of title 2 of chapter 15 of the Code of Civil Procedure, which rendered it impossible for the plaintiffs to recover a judgment and have an execution returned unsatisfied pursuant to the last quoted section, by reason of which fact they became entitled to maintain this action for the recovery of any debt which, within the meaning of that section, fell due during the preceding year without first obtaining a judgment against the corporation and having an execution returned unsatisfied. (*Shellington v. Howland*, 67 Barb. 14; affirmed, 53 N. Y. 371; *Kincaid v. Dwinelle*, 5 J. & S. 326; affirmed, 59 N. Y. 548.)

The case last cited arose out of the following facts: An action was brought against a corporation by a judgment creditor pursuant to sections 36 and 37 of article 2, title 4, chapter 8, part 3 of the Revised Statutes, in which a receiver was appointed, on the 24th of April, 1886, with the powers conferred by the Revised Statutes, by chapter 71 of the Laws of 1852, and by chapter 463 of the Laws of 1860. On the 11th of December, 1866, a judgment was recovered for wages earned during the preceding year on which an execution was returned unsatisfied; and in April, 1877, Kincaid began an action, under section 18 of chapter 40, Laws of 1848, to recover the amount of the judgment from Dwinelle, a shareholder. It did not appear that a final judgment dissolving the corporation had been entered, but it was insisted, in behalf of the defending shareholder, that by the appointment of a receiver the corporation was dissolved, and could not thereafter sue or be sued, and that the judgment of December 11, 1866, having been entered in an action begun after the receivership, was a nullity. It was said by ALLEN, J., speaking for a unanimous court: "If the position of the appellant, that the New York Silk Manufacturing Company was *ipso facto* dissolved by the appointment of a receiver in April, 1866, and was not thereafter capable of suing and being sued as a corporation, is well taken, it would seem to follow that the condition precedent to an action against a stockholder, that there must be an unsatisfied judg-

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ment against the corporation, having become impossible of performance by the act and operation of law, is no longer of force, and the creditor has his action at once against the stockholders without the necessity of an attempt first to recover the debt of the corporation. (*Shellington v. Howland*, 53 N. Y. 371.) The proceeding against the corporation is only required for the benefit of the stockholders, as a part of the immunity against a primary personal liability vouchsafed by law to incorporators shielding them from action until a *bona fide* attempt has been made and exhausted to obtain payment from the corporate property.

"The judgment against the corporation is of no virtue or effect in the action against the stockholder, and is only evidence as proving the performance of the condition precedent. If, therefore, the judgment was valid the condition was performed; if it was a nullity, because there was no corporation in existence after the appointment of the receiver, the condition was impossible of performance and was of no force, and the right of the plaintiff to his action was perfect. Any other rule would give to stockholders of corporations, laboring under pecuniary embarrassments, a very easy way of escape from statutory liabilities, and would make the security intended by the personal liability clause of the act for the formation of manufacturing corporations (Chap. 40 of Laws of 1848), for services performed for the corporation by laborers, servants and apprentices a sham and a cheat rather than a substantial benefit."

The Ithaca Organ and Piano Company having been dissolved, this case falls within the reasoning of the one last cited.

In *Flash v. Conn.* (109 U. S. 371), which arose under the Manufacturing Act, it was held that when a corporation had been adjudicated a bankrupt it was unnecessary for a creditor to obtain a judgment before bringing his action to charge a shareholder under the 10th section of the act, which seems to conflict with *Birmingham Nat. Bank v. Mosser* (14 Hun, 605).

Handy v. Draper (89 N. Y. 335) and *Rocky Mountain Nat. Bank v. Bliss* (Id. 338) are not in conflict with *Shellington v. Holland* or *Kincaid v. Dwinelle*, for in those cases no

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reason existed for not recovering judgments against the corporations. In *Cuykendall v. Corning* (88 N. Y. 129), it was said: "The further facts must be alleged which are essential under the act of 1848 to disclose a right of action against the stockholders, viz., that the capital was not paid in; that the debt for which the stockholder is sought to be charged was a contract debt, and was contracted to be paid within one year; that an action was brought against the company within one year; that judgment was recovered thereon and execution returned unsatisfied. Or if, under the doctrine of the cases of *Shellington v. Howland* (53 N. Y. 374) and *Kincaid v. Dwinelle* (59 id. 551), the condition of recovering a judgment had been rendered impossible by the act of the defendant, or the act of the law, that fact must be shown."

Was this action begun within one year after the debts sought to be recovered by it became due within the meaning of the twenty-fourth section?

On various dates between June 16, and October 4, 1883, the plaintiffs sold and delivered to the Ithaca Organ and Piano Company, thirty-nine pianos for \$7,540.50, under a written contract providing that "Settlement to be made within ninety days from average date of shipments, either by cash or sixty days' note, with interest." August 7, 1883, was the average date of the shipments. November 5, 1883, the \$7,540.50 was payable in cash or by note, but before that date the corporation settled the account by giving four notes running four months, of the dates and for the amounts following: September 28, 1883, \$3,000, due January 31, 1884; October 10, 1883, \$1,530.74, due February 13, 1884; November 1, 1883, \$2,205, due March 4, 1884; November 1, 1883, \$1,000, due March 4, 1884.

The difference, \$195.24, between the price of the pianos and the amount of these notes was the interest added pursuant to the contract.

The note for \$1,000 was paid in cash, but the others were taken up partly by cash and partly by new notes made by the corporation, which were also taken up partly by cash and partly

by like new notes, and they in turn were taken up in the same way until the following were given on which this action was brought: October 1, 1884, \$1,586.20 due February 4, 1885; November 24, 1884, \$500 due December 29, 1884; November 24, 1884, \$1,000 due January 5, 1885; December 4, 1884, \$1,530.74 due April 7, 1885.

The year within which an action must be begun for the recovery of a debt owing by a manufacturing corporation so as to lay a foundation for a recovery against a stockholder, begins to run on the day when the debt first became due, and if the time of its payment is extended by a promissory note which is sued within a year from the date of its maturity, but more than a year after the date when the debt for which it was given first became due, and a judgment is recovered and an execution returned unsatisfied, it is not a compliance with the section quoted, and stockholders cannot be charged with the payment of the debt. (*Parrott v. Colby*, 6 Hun, 55, affirmed 71 N. Y. 597; *Jagger Iron Co. v. Walker*, 76 id. 521; *Parrott v. Sawyer*, 22 Hun, 611, affirmed 87 N. Y. 622; *S. C.* 13 N. Y. W. Dig. 317.)

It is sought to distinguish the cases cited from the one in hand, because in the latter the date when the purchase-price of the pianos should become payable in money was not definitely fixed until the four notes were given, as the average date of all the shipments changed with every successive sale under the contract, and that before November 5, 1883 (the date when the price of all the pianos was payable in cash), the notes were given which were dishonored within the year preceding the date of the dissolution of the corporation. We think the case in hand is not distinguishable in principle from those cited. By the terms of the contract, and the action of the parties under it, the original debt became due November 5, 1883, and the extension before that date of the time in which it might be paid had the same effect on the rights of the creditor, the corporation and its shareholders as though the extension had been made at or after the maturity of the debt. The object of the section is to protect persons who credit manufacturing

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corporations for not longer than twelve months. Those who, in the first instance, give more than a year's credit are expressly excluded from the benefit of the section, and we cannot see that those who, by successive extensions, lengthen the period of credit beyond one year, are within the letter or spirit of the statute. By extending the time for the payment of a debt due from such a corporation by one or by several contracts, the creditor loses his claim upon the shareholders under the tenth section.

The Ithaca Organ and Piano Company was also indebted to the plaintiffs on a promissory note given for a debt that fell due more than a year before the dissolution of the corporation, which it satisfied September 9, 1884, partly in cash and partly by indorsing and delivering to the plaintiffs a promissory note made by E. L. Spargo, for \$475, payable to the corporation seventy-five days after date, which, at maturity, November 25, 1884, was dishonored and protested, the amount of which is sought to be recovered in this action.

It is urged that this note is not an extension of the period in which the original debt was to be paid, but that it was *pro tanto* payment, creating a new liability by the indorsement, which matured within the year preceding the dissolution of the corporation. As hereinbefore said, the object of the statute was the protection of creditors for a definite time, and they cannot extend it beyond the statutory limit and retain their right to recover from the shareholders. If creditors of manufacturing corporations desire to hold its shareholders liable under the tenth section, their claims must become due within one year from the time when contracted, and the period of credit must not be extended by new contracts between the corporation and the creditor.

The order should be affirmed and judgment absolute rendered against the appellant, with costs.

BRADLEY, J. I concur in the result, and my non-concurrence in the views expressed in the prevailing opinion has relation only to the effect of the transfer of the Spargo note.

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to the plaintiff by the Ithaca Organ and Piano Company, indorsed by the latter. That company was the holder of the note. And it must be assumed on this review that it was delivered by the company to and taken by the plaintiffs in payment of an amount of the debt due them from the company equal to that of note; and in that view so much of the debt was extinguished, and the only liability of Piano Company in that respect existing was that created by its indorsement. The contract made by the indorsement was a new and independent one made legitimately in due and regular course of business, and comes within the meaning of "debts and contracts made by such company" mentioned in section 10 of the Manufacturing Act. The determination of that question was not necessary to the result reached, as the recovery embraced also the amount represented by renewal notes of debt, the time for payment of which as originally contracted for expired more than a year before the dissolution of the corporation.

All concur, except BRADLEY, J., who concurs in result, and HAIGHT, J., not sitting.

Order affirmed and judgment absolute in favor of defendants on stipulation.

DANIEL H. ZIMMER, Appellant, v. DAVID SETTLE et al.,
Respondents.

It seems, articles of separation between a husband and wife in which another joins as trustee, although valid when made, are rendered void by the resumption of the conjugal relation.

The wife of plaintiff, having brought an action against him for limited divorce, for the purpose of settling the action he paid to defendants \$400 and received their bond, conditioned that they would support and maintain the wife during life, and would forever save him harmless and exempt from any further liability therefor. At the time of the execution of the bond the wife had left her husband, and was living with defendant D., her father. She subsequently returned to her husband, became a member of his family, obtained clothing upon his credit, for which he was required to and did pay, and he supported her. *Held*, that

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an action to enforce the bond was not maintainable, that it having been executed in view of the separation, the obligation was dependent upon its continuance; that when the wife returned to her husband resuming permanently her place as his wife, the cause which led to the contract ceased and the considerations upon which it rested disappeared, and this although the wife returned to her husband's home without his consent; that she had the right so to do and he was bound to receive her.

It seems that plaintiff is entitled to reimbursement of the money paid by him.

There was evidence tending to show that the husband and wife had not fully resumed their conjugal relations. *Held*, immaterial; that their reconciliation was apparently complete and defendants had the right to assume it was wholly so.

(Argued October 28, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 9, 1886, which affirmed an order of Special Term denying a motion for a new trial.

Upon the trial the court directed a verdict for the defendants.

This action was brought upon a bond executed by the defendants to the plaintiff, dated April 7, 1879.

The bond recited that differences had arisen between Annie M. Zimmer and Daniel H. Zimmer, her husband; that she had brought an action against him for a limited divorce and for her support; that the parties had agreed upon a settlement of it; and that Zimmer had paid to the defendants \$400; and containing the condition that if defendants "do well and truly properly support, maintain, clothe, board, furnish with all the necessaries of life in sickness and in health, and tenderly care for the said Annie M. Zimmer during the term of her natural life, and in sickness, furnish her proper medical attendance, and in every way render all such assistance and support as her husband might be under obligations to do, and forever save the said Daniel H. Zimmer entirely harmless and exempt from any further support of the said Annie M. Zimmer, or from annoyance, suits, costs or claims on account of the said Annie M. Zimmer during the term of her natural life; and shall pay

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her necessary and proper funeral expenses after death," then the obligation to be void, else to remain in force.

The defendant David Settle is the father, and the other defendants the brothers, of Annie M. Zimmer. In October, 1878, she left her husband and went to her father's house, where she was living at the time the bond was executed in April, 1879; on July 23, 1879, she returned to the house of her husband and was living there at the time this action was commenced in November following. The breach alleged is that the defendants had failed and refused to save the plaintiff harmless from claims and suits on account of his wife, and to take care of her, etc.; and that in consequence of such default, the plaintiff has been compelled to pay certain claims and to provide for and support her. It appeared that after the return of the wife to the plaintiff's house she obtained some clothing for herself upon his credit, for which he was required to and did pay, and that he supported her. A verdict was directed for the defendants.

C. A. Clark for appellant. Defendants were under a continuing obligation, and bound when she returned to support her and a refusal to board her and telling her he would not board her and saying he had never received her only as a visitor, shows clearly there had been a violation of the contract contained in the bond, a breach of the contract that rendered defendants liable. (*Hogeboom v. Hall*, 24 Wend. 146, 149; *Loomis v. Loomis*, 35 Barb. 624; *Shuffer v. Lee*, 8 id. 412; *Schell v. Plumb*, 55 N. Y. 592, 597.) The answer practically admits the cause of action, taking the bond as it reads, and as it was intended to be drawn by the plaintiff, and was understood by the defendants when executed. (*Paine v. Jones*, 75 N. Y. 593; *Nevius v. Dunlap*, 33 id. 676; *Moran v. McLarty*, 75 id. 25; *Phillips v. Gallant*, 62 id. 256; *Whittemore v. Farrington*, 76 id. 452; *Mead v. W. F. Ins. Co.*, 64 id. 453; Code Civ. Pro. § 1915.) When the contract is silent as to the place where a person is to be supported, and parties obligate themselves to maintain and support such person during the

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term of natural life, the contract is not confined to the home of the obligor. (*Loomis v. Loomis*, 35 Barb. 624.) The contract was entire and there is no dispute of its total breach if it is to be construed as it reads and was intended by all the parties when made. And there is nothing to construe, there is no question over the meaning of the terms used or over any language in it. (*Shaffer v. Lee*, 8 Barb. 412; *Schell v. Plumb*, 55 N. Y. 592; *Wakeman v. W. & W. M. Co.*, 101 id. 212; *Dresser v. Dresser*, 35 Barb. 573; *Fish v. Folley*, 6 Hill, 54; *Republic of Mexico v. Ockerhausen*, 37 Hun, 533.) There is no necessity for the interpretation of this instrument to resort to extrinsic facts; it is not vague or ambiguous; its terms are clear, plain and explicit. It is its own interpreter. (*Brown v. Curtiss*, 2 N. Y. 225-227; *Chase v. H. Ins. Co.*, 20 id. 55; *Dwight v. G. L. Ins. Co.*, 103 id. 341; *Hoare v. Rennie*, 5 H. & N. 19; *Jeffries v. E. M. L. Ins. Co.*, 89 U. S. 833; 22 Wall. 47, 58; *Hogeboom v. Hall*, 24 Wend. 146, 149; *Shaffer v. Lee*, 8 Barb. 412, 415; *Schell v. Plumb*, 55 N. Y. 592.)

Alexander Cumming and *R. F. Bicher* for respondents. It is proper to take into consideration, in the interpretation of this bond, the external and surrounding circumstances under which it was made. (1 Greenl. on Ev. § 220; *Clark v. Woodruff*, 83 N. Y. 522; *Griffiths v. Hardenburgh*, 41 id. 468; *Durant v. Allen*, 65 id. 562; *White v. Hoyt*, 73 id. 505; *Talcot v. Arnold*, 61 id. 616; *Barlow v. Scott*, 24 id. 40; 52 id. 191; 54 id. 18; Powell on Cont. 389; 1 Black. Comm. 60, § 3.) It has accordingly been established as a general rule applicable to all agreements for separation, that, however absolute or unlimited in the phraseology and terms used they may be, it is a limitation and condition implied by law, in the very nature of such bonds, and by the objects for which they are intended to provide, thus limiting their scope and objects (and hence limiting their interpretation), that the reconciliation and reunion of the husband and wife puts an end to them. (2 Story's Eq. Juris. § 1428; *Scholey v. Goodman*, 1 C. & P. 36; *Earl of Westmeath v. Countess of Westmeath*, Jacob,

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126, 140; *Bateman v. Countess of Ross*, 1 Dow, 235; *Fletcher v. Fletcher*, 2 Cox's Cases in Eq. 99, 105; *St. John v. St. John*, 17 Ves. 525.) A separation in law is such a separation as deprives the wife of right of support from her husband, if it has no legal excuse on her part, and as subjects a husband to legal liability for necessities furnished to her by third persons, if such separation has no legal excuse on his part. And it was the sole purpose and scope of this bond to exempt the plaintiffs from responsibilities which the situation, as so defined, had then cast upon him, and from which he then sought to be relieved by the defendants. (*Emmett v. Norton*, 8 C. & P. 506; *Hendley v. Westmeath*, 6 Barn. & Cr. 200.) By the conditions of this bond the defendants acquitted themselves of their obligation, when they supported and maintained the plaintiff's wife at their several abodes. And if the defendants were entitled to keep and maintain her at their own houses, and not bound to support her elsewhere, the plaintiff has by his own act and interference, in permitting her to remain at his house, prevented the performance of the contract, and so could not maintain an action for the defendants' failure to support her at the plaintiff's house, where they were not bound to provide for her at all. (*Cornell v. Cornell*, 96 N. Y. 108.)

BRADLEY, J. The bond when made and delivered became a valid obligation of the defendants, and their defense is dependent upon the circumstances and effect of the return of the wife to her husband's house and home and her continuance there. The evidence did not justify the inference of any breach of the condition of the bond while the wife remained with them and before her return to the plaintiff in July, 1879. By the terms of that instrument the duty assumed by the defendants to provide for the wife and take care of her is not qualified by any circumstances or made subject to any conditions expressed in it. But it may be observed that at the time the contract was entered into she had left her husband and been absent from him six months, and there was then pending her action

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against him for a separation and alimony, which could be supported only on the ground of ill-treatment of her by her husband of a serious character. It evidently was then contemplated by the plaintiff and the defendants that the wife would not return to her husband, but would continue to live separated from him, and it was in view of such separation the bond was made and taken. This is also indicated by the recital in it that differences had arisen between the husband and wife, and that she had commenced an action against him for a limited divorce for her support. It may be assumed that the contract resulting in the giving and accepting the bond was entered into in reference to such situation, which is entitled to consideration in the determination of the purpose and effect of the instrument. This does not require any modifications of its provisions, but has relation to the application of the language used to the subject within the contemplation of the parties as represented by the situation then existing and the surrounding circumstances, which it may be assumed they then had in view. (*Griffiths v. Hardenbergh*, 41 N. Y. 464; *Blossom v. Griffin*, 13 id. 569; *Juilliard v. Chaffee*, 92 id. 529.)

The occasion which led to this contract and obligation between the parties was the separation of the wife from her husband, and such was the sole cause for entering into it. It cannot be assumed that there was any purpose to, in that manner, make provision for her care and support as a member of the plaintiff's family. Such an obligation for that purpose evidently was not in the mind of the parties. Nor was it contemplated that she would return to and live with the plaintiff, but, on the contrary, it was understood that the situation then existing in that respect would continue, and in that view the parties acted in contracting for and making the obligation. Any other view seems to be contrary to their apparent purpose and repugnant to reason. The primary duty to take care of and support a wife is with the husband, and it cannot be supposed, unless the circumstances clearly require such conclusion, that he intends, while she is living with him, to deny himself

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that right, relieve himself from all responsibility in that respect, and to devolve the performance of that duty wholly upon another. In the present case, the existing separation upon which the contract was founded, justified it at the time it was made. But when the wife returned to the house of her husband to live and lived with him there, resuming permanently her membership of his family as his wife, the cause which led to the contract ceased to exist. Articles of separation between husband and wife in which another joins with her as trustee, although valid when made, are rendered void by resumption by them of their conjugal relation. (*Shelthar v. Gregory*, 2 Wend. 422; *Carson v. Murray*, 3 Paige, 483.) It is, however, urged that there was in this instance no reconciliation in the sense requisite to annul articles of separation; that, at all events, the court could not properly hold, as matter of law, that it was so, because there was evidence tending to prove that the husband did not consent to her return, and did not receive and fully cohabit with her as his wife. While there is evidence to that effect, it appears that his relations of cohabitation with her were substantially the same as they were for considerable time before she left his house. There were no articles of separation in this instance, nor had the wife entered into any agreement to that effect with her husband. She was, therefore, without the fault of the husband, or of the defendants, at liberty to seek to make her husband's home hers. The defendants had no right or lawful power to prevent her doing so. And any undertaking on their part to prevent the restoration of conjugal rights or relations of the husband and wife would have been void as against public policy. They, therefore, had no right against her consent to take her away from the plaintiff's house. Her purpose evidently was to remain there, and he permitted her to do so. It is difficult to see how he could properly do otherwise. This view is as favorable to the contention of the plaintiff in that respect as can be taken. As between her and the plaintiff, it was the right of the wife to return to her husband's house and insist that it was her home, and it was his duty to provide for her there, unless by her con-

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duct she had forfeited that right. This is not claimed. She was not required to respect any arrangement made between her husband and another party for her provision and care elsewhere. This was one of the contingencies which was not only not provided for by the terms of the contract between the parties, but was not subject to the control of either. And when the resumption of her home with the plaintiff could be considered permanent, a situation would be produced not provided for by the contract or within its contemplation when it was made. The situation would be such that the plaintiff could realize no benefit from the undertaking assumed by defendants, and they would not be required to attempt to induce her to leave her husband and go to their house to receive support, nor would they be justified in seeking to do so without the consent of the husband. The consequence would be that the contract, as represented by the condition of the bond, would cease to be effectually operative for the purposes of the burden or benefit of its performance, for reasons resulting from the default of neither, produced by a cause over which none of the parties to it had any control which they could legally exercise. And that situation, when accomplished, would put an end to the contract and the obligation made pursuant to it, and the plaintiff be entitled to reimbursement of the consideration paid by him. (*Hildreth v. Buell*, 18 Barb. 107; *Jones v. Judd*, 4 N. Y. 412.) The defendants, after the return of the wife to her husband to remain there, took that view of the matter, and through a third person proposed to the plaintiff to repay to him the \$400, and by their answer alleged their readiness to do so. The further performance by the defendants of their obligation within its meaning and purpose, required a separation of the wife from the husband and her removal from his home. This could not effectually be made the subject of contract between these parties, and it would be no less unlawful for them to execute such a purpose without her consent. It would be repugnant to the policy of the law pertaining to the marital relations, rights and duties of husband and wife. And it was

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through the exercise of her right that the wife sought and obtained the home of her husband and children and his care and support. Thus the purpose of the defendants' bond seemed to have been defeated.

It is, however, contended on the part of the plaintiff that the duty of the defendants to care for and support the wife and indemnify the plaintiff from expense and liability in that behalf was no less after her return to her husband than while she was living separate from him, unless their reconciliation was, as between themselves, complete, so that they fully resumed their conjugal relations. This proposition is in disregard of the apparent relation and other considerations arising from it. It is, however, not entirely clear what is essential to reconciliation in its application to the present case if it did not exist between the plaintiff and his wife. It does not depend upon any particular degree of reciprocal affection or esteem. As between persons in such relation, it may arise from appreciation and observance by them of their marital duty to each other. The husband and wife in this instance not only resided in the same house, and had done so for nearly six years at the time of the trial, but they, during that time, with their children, ate at the same table; they were friendly and kind to each other, and, with no apparent difference in that respect, occupied separate sleeping rooms, as they had for two years before. The wife was partially blind, and in no condition to do housework, and the evidence tends to prove that she took no charge of it. It would be a step in advance, without support of sound policy, to hold that as between the husband and third persons the rights of the latter could not rest upon his apparent relations with his wife while they are living together.

The husband, while living with his wife, may be treated by third persons as assuming the rights, duties and liabilities incident to the marital relation, and to a reasonable extent her authority to use his credit may be presumed in behalf of those not advised to the contrary. (*Emmett v. Norton*, 8 Carr. & P. 506; *Keller v. Phillips*, 39 N. Y. 351.) And this is

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not confined to actual necessities for herself, as is the case when the wife is justifiably living apart from him. The credit of the husband used by the wife under such circumstances might create as against him greater liabilities than those with which the defendants would be chargeable upon their undertaking. This is only one reason why the apparent relation between the plaintiff and his wife was not consistent with the performance of their covenant. They were not advised by the plaintiff or otherwise that it was other than it appeared to be by the fact that the plaintiff and his wife were living together; and for the purpose of the question here their apparent, in view of its uninterrupted continuance, must be deemed their actual relation. The situation is different from what it would have been if the wife had left the defendant's house and went to a place other than the house of her husband to live. Then a question would have arisen which requires no consideration here. She, in that case, would have resumed no relation to the plaintiff which would have cast upon him, as between him and the defendants, any duty, apparent or real, to relieve them from the obligation they had assumed, as he did not undertake that she should remain at the house of the defendants.

The view taken renders it unnecessary to consider the consequences of breach by the defendants of their obligation in respect to the rule of damages, and whether they be partial and limited to such as were sustained prior to the commencement of the action, or also prospective and final.

The most that can be claimed by the plaintiff in support of his motion to amend his complaint by inserting allegations with a view to a recovery of the consideration paid to them is that the ruling of the court upon it was discretionary. The disposition of the motion is not, therefore, the subject of consideration on this review. And as the action, as represented by the cause alleged in the complaint, did not proceed with that view, the question whether the plaintiff was entitled to reimbursement from the defendants of the amount paid to them as the consideration of their obligation, or any portion of it, did not arise for determination upon the trial.

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These views lead to the conclusion that none of the exceptions were well taken.

The judgment should be affirmed.

All concur except POTTER and VANN, JJ., not voting, and FOLLETT, Ch. J., not sitting.

Judgment affirmed.

THE METROPOLITAN LIFE INSURANCE COMPANY, Appellant, v.
ESTHER M. BENDER et al., as Executrix, etc., Respondents.

Where a penal bond recites that it was executed under seal, the obligor is estopped, in an action on the bond, from denying that it was so executed, when it appears that he knew the difference, in legal effect, between sealed and unsealed instruments; that he read, subscribed and placed the instrument in the custody of the person interested in having it accepted, who attached the seal and delivered it to the obligee, and that the latter received and acted upon it in good faith, supposing it to have been executed under seal.

Gilken v. Thumbird (44 Md. 337); *Taylor v. Glaser* (2 S. & R. 502), distinguished.

Town of Barnet v. Abbott (53 Vt. 120), distinguished and disapproved.

Met. Life Ins. Co. v. McCoy (41 Hun, 142), reversed.

(Argued December 1, 1890; decided January 14, 1891.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made June 30, 1886, which granted a motion made in that court pursuant to section 1000 of the Code of Civil Procedure to set aside a verdict directed for the plaintiff and ordered a new trial.

This was an action upon a bond given by defendant's testator, Shibboleth B. McCoy, to plaintiff as surety for George W. Sherman, one of its agents.

On February 25, 1870, the plaintiff appointed George W. Sherman its agent, and thereafter he delivered to it the following bond :

"Know all men by these presents, that we, Robert T. Sherman and S. B. McCoy, of the city of Albany, county of Albany, State of New York, are held and firmly bound unto

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Metropolitan Life Insurance Company of New York, in the sum of two thousand dollars, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

"Sealed with our seals. Dated this ninth day of March, one thousand eight hundred and seventy.

"The condition of this obligation is such that if George W. Sherman, who has been appointed an agent of the said Metropolitan Life Insurance Company of New York city, shall faithfully conform to all instructions and directions which he, as such agent, may at any time receive from the said Metropolitan Life Insurance Company, and shall on the fifth day of each and every month remit to the office of the said Metropolitan Life Insurance Company all moneys received by him (not previously remitted) as such agent, less his commission, together with his account of the same, then the above obligation to be void, otherwise to remain in full force and virtue.

"ROBERT T. SHERMAN. [L. s.]

"S. B. McCOY. [L. s.]

"Sealed and delivered in presence of

"Witness: I. C. LAASS.

"Witness: GEO. B. FAY.

"Witness: GEO. W. SHERMAN."

George W. Sherman continued to act as agent until September, 1871, when he was found to be indebted to the company in about the sum of \$1,600. The agent died February 16, 1880, and March twenty-third of that year this action was begun against his sureties on the bond. Robert T. Sherman pleaded in bar a discharge in bankruptcy and that he did not execute the bond under seal. The action was discontinued as to him, but continued against the respondent, who, on the trial, amended his answer and interposed the plea that he never sealed the bond, and that it had been materially altered by affixing a seal to his signature. The defendant testified that he neither sealed nor authorized anyone to seal the bond, and that he did not sign in the presence of either of the subscribing witnesses, and did not request either to sign, nor did he see

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either sign. The other obligor testified that he executed the bond after the defendant and in the presence of Laass and Fay, who at his request signed as witnesses and then he gave it to George W. Sherman, at which time no seal was affixed to the signature of either of the sureties. He further testified: "I do not know when those seals were put on; my brother George came in and asked me for a couple of seals and I gave them to him. That was after Mr. McCoy had signed it, and it was after the other witnesses had signed it. * * * About that time George came to me and asked after seals and I gave them to him. * * * I went to McCoy's lawyer, a year and a half or two years ago, and spoke to him about it, and told him I recollected the seal and would like to see the bond, as it was a black seal I had got from an old firm that went out of business years ago in Albany, and I gave George some of the seals. When I came to see the bond those black seals were on."

This evidence was uncontradicted and so was the testimony of the defendants' agent, that when the bond was given to him it was sealed and in the same condition as it was at the trial. A verdict was directed for the plaintiff, neither party asking to go to the jury, and the exceptions were ordered heard in the first instance at the General Term.

Further facts are stated in the opinion.

William H. Arnoux for appellant. The rulings at Circuit and the General Term that the plaintiff had made out a case of breach of the bond were correct. (*Thompson v. McGregor*, 81 N. Y. 592; *People v. White*, 28 Hun, 289; Abb. Tr. Ev. 474; *Hatch v. Elkins*, 65 N. Y. 498.) The bond in suit was duly sealed. (*Bradley v. Lapham*, 13 Gray, 297; *Wilder v. Butterfield*, 50 How. Pr. 391; *A. D. Co. v. Leavitt*, 54 N. Y. 35, 40; *Ludlow v. Simond*, 2 Caines' Cas. 7, 42, 55; *Mackay v. Bloodgood*, 9 Johns. 285; 27 N. Y. 564; *Townsend v. Hubbard*, 4 Hill, 351; *Vanalstyne v. Vanslyck*, 10 Barb. 383; 27 N. Y. 564.) The surety, McCoy, was estopped from denying that the seal was affixed by him or with his authority; and that the bond is under seal. (*Russell v. Frear*, 56 N.

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Y. 71; *Duer v. U. S.*, 16 Wall. 1; *Richardson v. Rogers*, 50 How. Pr. 407, 408; *Hurd v. Kelly*, 78 N. Y. 588, 598; *State v. Beck*, 52 Me. 884; *Butler v. U. S.*, 21 Wall. 272, 275.) There is no legal force in the plea of *laches*. (*People v. White*, 28 Hun, 289.)

Seymour Van Santvoord for respondents. There was no implied authority to affix a seal. (*Kelly v. McCormick*, 28 N. Y. 318; *U. S. v. Linn*, 15 Pet. 290; *Ledwich v. McKinn*, 53 N. Y. 314; *Weyerheyser v. Dun*, 100 id. 150; *Taylor v. Glazer*, 2 S. & R. 502; *Bowman v. Robb*, 5 Penn. St. 304; *Chilnon v. People*, 66 Ill. 501, 503; *Brooks v. Kiser*, 69 Ga. 762; *Warren v. Lynch*, 5 Johns. 245; *Town of Solon v. W. Bank*, 114 N. Y. 122.) If the obligation is held to have been a simple contract, then the addition of a seal by extending the liability of the maker, and by imposing upon him an added risk and burden which nothing in the record shows that he ever contemplated or deemed possible discharged the maker not authorizing or ratifying it. (*Cronkhite v. Nebeker*, 81 Ind. 323; *Vaughan v. Fowler*, 37 Am. Rep. 731; *Greenfield v. Howell*, 123 Mass. 196; *Brown v. Reed*, 79 Penn. St. 370.) There are no facts that would estop the sureties from insisting that their liability is to be measured and determined by the instrument as they made it. (*Barnet v. Abbott*, 53 Vt. 120.) If there was no implied authority for the affixing of a seal, there is no principle of law to support the directing of a verdict for plaintiff. (*Russell v. Frear*, 56 N. Y. 67; *Hurd v. Kelly*, 78 id. 588; 32 id. 445.)

FOLLETT, Ch. J. By signing the bond containing the recital that it was "sealed with our seals. Dated this ninth day of March, eighteen hundred and seventy," the defendant asserted in writing over his own signature in the most solemn manner that the obligation was what a bond *ex vi termini* imports, a sealed instrument, and that it was sealed by him. The assertion was undoubtedly untrue, but it was made and put forth in the way best calculated to deceive, as it did deceive the

obligee. Had the defendant intended in good faith to execute and deliver an unsealed instrument, he should have stricken out the words quoted or have taken great care to have it delivered to the obligee as executed by him, but he did neither. He testified: "I signed the bond * * * at that time I knew the difference between a paper under seal and one not under seal. I would not sign it with a seal, too much force in a seal, extended the time too much, extended my liability too long * * * I presume I read it before I signed it." After the defendant had signed he turned the instrument over to the person for whose benefit it was given and whom he knew to be interested in procuring a bond executed in due form and acceptable to the obligee. Sherman then procured the signature of his brother and obtained from him the seals which he undoubtedly affixed to the signatures of the obligors. The fact that Sherman openly, and evidently in good faith, sealed and delivered it to the company which received it in like good faith is established by uncontradicted evidence. Under these circumstances the defendant should be held to be estopped by the recital and by his conduct from showing that he did not seal or authorize the sealing of the bond.

The recital of a material fact in a bond which is accepted by the obligee and acted on in the belief of the truth of the statement, estops the obligor from showing in an action on the bond that the recital is not true. (*Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Cady v. Eggleston*, 11 Mass. 282-285; *Dyer v. Rich*, 1 Met. 180; *Washington Co. Ins. Co. v. Colton*, 26 Conn. 42; *Trimble v. State*, 4 Blackford, 42; Big. Est. [5th ed.] 382.

Gilkeson v. Humbird (54 Md. 337), and *Taylor v. Glaser* (2 S. & R. 502), are types of cases holding that when a penal bond is delivered to and received by the obligee without seals, a recital therein that it is sealed does not make it a specialty or estop the obligor from denying that he is liable as on a sealed instrument, a rule which no one would dispute, but which is not related to the case in hand. *Barnet v. Abbott* (53 Vt. 120) is in point, and holds that a recital in a bond that

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it is "sealed with our seals" is evidence that it was sealed when delivered, but not proof, and that the obligor may show that he neither sealed, nor authorized it to be sealed. In that case, a person appointed to the office of town treasurer executed as principal with three sureties a bond purporting to be under seal, but the sureties did not affix seals to their signatures, or authorize it to be done. The treasurer, at whose request the bond was executed, affixed seals and delivered the bond to the selectmen, and it was held in an action brought upon the bond against the sureties that they were not estopped from denying that they sealed or authorized the sealing of the bond.

The case last cited seems to be opposed in principle to those previously referred to, and to lay down a dangerous rule. A great variety of bonds are in use in this country, bonds conditioned to secure the payment of money, the performance of contracts, the faithful discharge of duties by trustees and by public officers, which recite that they are executed under seal, and they generally are. It is usually impossible to prove the genuineness of the common-law seal in use in this state, which consists simply of an impression made on a round bit of paper affixed to the instrument by mucilage or by a wafer. There are differences in signatures by which they may be identified and proved, but there are none in seals. Sometimes, though not usually, the execution of bonds is acknowledged, but many are not, and the certificate ordinarily used recites that the person named acknowledged that he executed the instrument, not that he signed, sealed and delivered it, and the acknowledgement is but evidence, not proof, of due execution of the instrument acknowledged. (Code Civil Procedure, §§ 935, 936, 937.)

In an action on a penal bond in which it is recited that it is executed under seal, the obligor is estopped from denying that it was so executed when it appears by his own evidence that he knew the difference in the legal effect between sealed and unsealed instruments; that he read, subscribed and placed it in the custody of the person interested in having it accepted,

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when it also appears that that person seals and delivers it to the obligee, who receives and acts on it in good faith. A different rule would open the way for cutting down by oral evidence the duration of obligations from twenty to six years.

The order should be reversed and a judgment ordered on the verdict in favor of plaintiff, with costs.

All concur, except PARKER, J., not sitting.

Order reversed and judgment accordingly.

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PHILIP CARPENTER, Respondent, v. THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Appellant.

It seems that a railroad corporation does not undertake to carry and safely deliver the effects of travelers not delivered into its custody, and while money, necessary for the expense of a journey undertaken, which is carried in the trunk of a passenger, is part of his baggage, and if lost while in the custody of the corporation for transportation, it is liable, money in the clothing worn by the passenger is not in its custody, and it is not chargeable for its loss, unless negligence on its part is shown.

A railroad corporation which runs sleeping-coaches on its road, with sections separated from the aisle only by curtains, is bound to have an employe charged with the duty of carefully and continually watching the interior of each car while berths are occupied by passengers.

It seems, the mere proof of the loss of money by a passenger while occupying a berth in such a car, does not make out a *prima facie* case against the corporation; some further evidence tending to show negligence on its part must be given.

In an action to recover for money alleged to have been lost by plaintiff while a passenger in a sleeping-car on defendant's road, the following facts appeared: Defendant runs upon its roads sleeping-cars, with the usual accommodations. Plaintiff purchased and was assigned a lower berth; when he went to bed he placed his pocket-book, containing the money in question, in the inside pocket of his vest, which he placed under his pillow on the side next to the window; the next morning he found his vest under his pillow on the side next to the passage-way, with his pocket-book in the pocket, but the money had been stolen. The upper berth was occupied by a stranger, but was unoccupied when plaintiff arose in the morning. At one end of the car was the porter's closet. A full view of the passage-way of the car could not be had from all parts of the space at that end. The train made a number of stops at large

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cities during the night. The porter was the only employe on the car; he acted as conductor, and for his own profit blackened the passengers' boots. The court granted a motion by defendant to dismiss the complaint. *Held*, error; that the evidence was sufficient to put defendant to proof of the care it took of the occupants of the sleeper on the trip in question, and, in the absence of explanation, it was sufficient to require the question, whether plaintiff's loss was caused by defendant's negligence, to be submitted to the jury.

(Argued December 2, 1890· decided January 14, 1891.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, reversing a judgment of the General Term of the City Court of New York, which affirmed a judgment dismissing the complaint on the merits entered upon an order at the Trial Term.

This action was brought to recover money alleged to have been stolen from plaintiff while a passenger on one of defendant's sleeping-cars.

The defendant, a railroad corporation, is a carrier of passengers over its line between the cities of New York and Boston, and runs sleeping-cars with the usual accommodations.

July 6, 1885, the plaintiff paid his fare and \$1.50 for a berth from New York to Boston, and took passage on a train that left the Grand Central station at half past ten o'clock in the evening. He was assigned the lower berth in section ten of the sleeping-car "Boston" and went immediately to bed. A colored porter was in charge of the car, to whom plaintiff gave his passage and sleeping-car tickets. He testified that he undressed and placed his pocket-book containing \$40 in money in his inside vest pocket, and then placed that garment under the pillow next to the window. He slept soundly and without waking until about six o'clock in the morning when the train was near Boston. Seeking his vest he found it under the pillow next to the passage-way with his pocket-book in the pocket, but the money had been stolen. His watch, which was in another pocket of the garment, and about \$3 in silver in a third pocket were not taken. When the plaintiff went to bed the berth over him was occupied by a stranger, but it was unoccupied

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when he got up. On discovering his loss, he called the porter and acquainted him with the fact.

At the close of plaintiff's evidence, in response to a question of the court, defendant's counsel stated that he did not intend to offer any evidence. Under a stipulation the court reserved his decision and subsequently dismissed the complaint, on the ground that defendant was neither liable as an innkeeper or common carrier, and that there was no evidence of negligence.

Further facts are stated in the opinion.

Henry W. Taft for appellant. A sleeping-car company is not an innkeeper or a common carrier, and is only bound to use reasonable diligence in protecting the property of its patrons. (2 Beach on Railways, §§ 908, 909; 2 Rorer on Railroads, 987; Thompson on Carriers, 530; Hutchinson on Carriers, § 60, note 2; *Blum v. S. P. P. C. Co.*, 1 Flip. 500; *Lewis v. N. Y. S. C. Co.*, 143 Mass. 273; *P. P. C. Co. v. Gardner*, 3 Penn. 78; *Tracy v. P. P. C. Co.*, 67 How. Pr. 154; *I. C. R. R. Co. v. Handy*, 63 Miss. 614; *P. P. C. Co. v. Smith*, 73 Ill. 360; *P. P. C. Co. v. Gaylord*, 6 Ky. Law; *P. P. C. Co. v. Pollock*, 5 Am. St. Rep. 31; *Woodruff v. Diehl*, 84 Ind. 474; *Palmeter v. Wagner*, 11 Alb. L. J. 149; 13 id. 221; *Welch v. P. P. C. Co.*, 16 Abb. Pr. [N. S.] 352.) Evidence of loss, unaccompanied by other proof, is not any evidence of negligence. (*Tracy v. P. P. C. Co.*, 67 How. Pr. 154; *P. P. C. Co. v. Smith*, 73 Ill. 360; *M. R. Co. v. Jackson*, 24 Eng. Rep. 124; 1 Philips on Ev. 604; *Baulee v. N. Y. & H. R. R. Co.*, 59 N. Y. 356; *Hayes v. F. S. S. R. Co.*, 97 id. 259; *W. S. C. Co. v. Diehl*, 34 Ind. 482; *Blum v. S. P. P. C. Co.*, 1 Flip. 500.) The fact that the defendant was both the common carrier and the owner and manager of the sleeping-car, cannot change the nature or extent of its liability. (*Macklin v. N. J. S. Co.*, 7 Abb. Pr. [N. S.] 239; *Crozier v. B. N. Y. & N. S. Co.*, 43 How. Pr. 466; *Mudgett v. B. S. S. Co.*, 1 Daly, 151; *Gore v. N. & N. Y. T. Co.*, 2 id. 254; Hutchinson on Carriers, § 60.) The appellant attempted to bring the case within the rule applied to bailees for hire,

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such as warehousemen, who are bound, upon proof of the loss of property entrusted to them, to show that they are free from blame. This rule has no application to the present case, as there is no liability whatever on the part of a bailee until delivery of the property has been made to him and he has accepted it. (*Grosvenor v. N. Y. C. R. R. Co.*, 39 N. Y. 36.) The declarations of the porter were properly excluded. (*Furst v. S. A. R. R. Co.*, 72 N. Y. 542.)

Jabish Holmes, Jr., for respondent. This defendant is liable as a common carrier for the property of a passenger lost, while the latter is asleep, and without negligence on his part. (*P. Co. v. Roy*, 102 U. S. 452; *Miles v. Cottle*, 6 Bing. 743; *Robinson v. Dunmore*, 2 B. & P. 419; *Brook v. Pickwick*, 4 Bing. 218; *Hollister v. Newlin*, 19 Wend. 234; *Richards v. L. & B. R. Co.*, L. R. [7 C. B.] 839; *Butcher v. L. & S. W. R. Co.*, 16 id. 13; *LeCouteur v. L. & S. W. R. Co.*, L. R. [1 Q. B.] 54; *Mudget v. B. S. S. Co.*, 1 Daly, 151; *Gore v. N. & N. Y. T. Co.*, 2 id. 254; *Macklin v. N. J. S. Co.*, 7 Abb. Pr. [N. S.] 229; *Crozier v. B., N. Y. & N. S. Co.*, 43 How. Pr. 466.) If defendant's liability is only that of a sleeping-car company, it was bound to exercise reasonable and ordinary care to protect plaintiff's property. (*Blum v. S. P. P. C. Co.*, 1 Flip. 500; Story on Bail, §§ 370, 422, 440, 444; *Mudge v. B. S. S. Co.*, 1 Daly, 151; *Gore v. N. & N. Y. T. Co.*, 2 id. 254; *Macklin v. N. Y. S. Co.*, 7 Abb. Pr. [N. S.] 229.) The evidence was at least sufficient to require the submission to the jury of the question of ordinary care. (*Bevis v. B. & O. R. Co.*, 26 Mo. App. 23, 27; *Lewis v. N. Y. S. C. Co.*, 143 Mass. 273; *P. P. C. Co. v. Gardner*, 3 Penn. 78; *Scaling v. P. P. C. Co.*, 24 Mo. App. 19; *Woodruff v. Diehl*, 84 Ind. 474; *P. P. C. Co. v. Pollock*, 3 Ry. & Corp. L. J. 45; *P. P. C. Co. v. Matthews*, 40 Am. & Eng. R. R. Cas. 644; *Payne v. T. & B. R. R. Co.*, 83 N. Y. 574; *Harris v. Perry*, 89 id. 311; *Ochsenbein v. Shapley*, 85 id. 224; *Stackus v. N. Y. C. R. R. Co.*, 79 id. 469; *Wolfkiel v. S. A. R. R. Co.*, 38 id. 49; *Weber v. N. Y. C. R. R. Co.*, 58 id. 455;

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Hart v. H. R. B. Co., 80 id. 622; *Justice v. Long*, 52 id. 323; *R. M. Co. v. N. H. S. Co.*, 50 id. 121; *Schwier v. N. Y. C. & H. R. R. Co.*, 90 id. 558.) The admissions and declarations of the porter were improperly excluded. (*P. P. C. Co. v. Gardner*, 3 Penn. 78; *Price v. Powell*, 3 N. Y. 322; *McCotter v. Hooker*, 8 id. 497; *Curtiss v. R. R. Co.*, 49 Barb. 148; *Palmer v. Bank*, 4 Wkly. Dig. 268; *Matterson v. N. Y. C. R. R. Co.*, 62 Barb. 364; *McCormack v. Barnum*, 10 Wend. 105; *Morse v. C. R. R. Co.*, 6 Gray, 450; *McGinness v. Adriatic Mills*, 116 Mass. 177; *Lane v. B. & A. R. R. Co.*, 112 id. 455; *Green v. B. & L. R. R. Co.*, 128 id. 221; *Railroad Co. v. Campbell*, 36 Ohio St. 467; *K. B. Co. v. F. R. R. Co.*, L. R. [9 Q. B.] 468; *Woodruff v. Diehl*, 84 Ind. 481.)

FOLLETT, Ch. J. Money necessary for the payment of the expense of a journey undertaken, which is carried in the trunk of a passenger is part of his baggage, and if lost while in the custody of a carrier for transportation it is liable. (*Merrill v. Grinnell*, 30 N. Y. 594; *Fairfax v. N. Y. C. & H. R. R. Co.*, 73 id. 167; 2 Red. R. R. 59.) But carriers do not undertake to carry and safely deliver the effects of travelers not delivered into their custody, and it cannot be held that money in a passenger's clothing worn during the day and placed under his pillow at night is in the custody of the corporation which carries and furnishes travelers with berths in sleeping-coaches. (*Lewis v. N. Y. Sleeping Car Co.*, 143 Mass. 267; 2 Rorer R. R. 887.)

The mere proof of the loss of money by a passenger while occupying a berth does not make out a *prima facie* case, and to sustain a recovery some evidence of negligence on the part of the defendant must be given.

The negligence complained of is that none of the defendant's employes were continually on guard in the car in a position to observe the movements of all persons in the passage-way between the sections.

A corporation engaged in running sleeping-coaches with sections separated from the aisle only by curtains is bound to have

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an employe charged with the duty of carefully and continually watching the interior of the car while berths are occupied by sleepers. (*Pullman Car Co. v. Gardner*, 3 Pennypacker, 78.)

These cars are used by both sexes of all ages, by the experienced and inexperienced, by the honest and dishonest, which is understood by the carriers, and though such companies are not insurers they must exercise vigilance to protect their sleeping customers from robbery. A traveler who pays for a berth is invited and has the right to sleep, and both parties to the contract know that he is to become powerless to defend his property from thieves, or his person from insult, and the company is bound to use a degree of care commensurate with the danger to which passengers are exposed. Considering the compensation received for such services and the hazards to which unguarded and sleeping travelers are exposed, the rule of diligence above declared is not too onerous. Did the plaintiff give evidence which would have authorized the jury to have found that the defendant did not discharge this duty to the plaintiff? The car in which the plaintiff rode was constructed with a passage-way through the center with sections on each side, each section containing two berths. These sections were separated from each other by movable wooden partitions, and from the aisle by two curtains, which were closed when a berth was occupied. At one end of the car was a toilet for women, shut off from the passage-way by a swinging door. On one side of the other end of the car was a toilet for men, opposite to which was the porter's closet. A full view of the main aisle could not be had from all parts of the space at the end last described. The train stopped at eight cities to take up and set down passengers, staying at New Haven twelve minutes, and at Springfield four.

The undisputed evidence is that the entire force employed on the sleeper, which ran over an important thoroughfare, and made frequent stops was one man who acted as conductor, as porter, and was also engaged for his own profit, in blackening the shoes of the passengers. Whether this employe had that part of the sleeper which is for the common use of passengers

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and the servants of the corporation constantly in view during the trip is not shown by the evidence, except inferentially. The facts hereinbefore referred to, that the car ran over an important route between two great cities, through and stopping at eight considerable ones, that but one person was employed on the car, the services rendered by him for the defendant, and those which he was at least permitted to render to passengers for his own profit, affirmatively appear, and in addition it may well be presumed that he assisted passengers in entering and leaving the coach at intermediate stations. The existence of these facts was not denied, nor was any explanation of them offered. The defendant gave no evidence. Under the circumstances the evidence was sufficient to put the defendant to proof of the care which it took of the occupants of the sleeper on this trip, and in the absence of any explanation on its part it was sufficient to require the question, whether the loss was caused by the defendant's negligence to be submitted to the jury.

The order should be affirmed and judgment absolute rendered against the appellant, with costs.

All concur.

Order affirmed and judgment absolute for the respondent.

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125	435

SUSAN F. BREWER, as Administratrix of HENRY F. BREWER, deceased, Respondent, v. THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Appellant.

A person entering into a contract of service with one employer may not, without his knowledge or assent, be made to assume the hazards of a service conducted by another and in which he is not engaged, and so be personally subjected to the consequences of the negligence of the latter, without remedy against him.

In an action brought to recover damages for the death of B., plaintiff's intestate, who was killed while traveling in an express car in one of defendant's trains, by an accident, caused by defendant's negligence, it appeared that B., at the time of his death, was in the employ of the U. S. Express Company, as messenger; that said company had entered into a contract with a railway company, to the rights and duties of which the defendant had succeeded by which said railway company

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agreed to transport the messengers of the express company and certain specified property free of charge; the latter assuming all transportation risks and other liabilities arising in respect thereof, and agreeing to indemnify and protect the former therefrom. The responsibility of the railway company in transporting express freight was limited to cases of negligence, it, "in no event, whether of negligence or otherwise," to be responsible for property "carried by the railway company free of charge." There was no evidence that B. had any knowledge or information of the provisions of the contract. *Held*, that defendant was liable; that B. was a passenger and could not, without his knowledge or consent, be chargeable with the stipulations in the contract; and that while, when he entered into the service of the express company he assumed the ordinary hazards incident to that business, there was no presumption or implied understanding that he took upon himself the risks of injury which he might suffer through defendant's negligence.

Seybolt v. N. Y., L. E. & W. R. R. Co. (95 N. Y. 562), distinguished.

It seems that, as the contract between the companies did not purport to relieve the defendant from its duty to exercise due care for the protection of the messenger, whatever right it could claim to relief from the consequences of its negligence in that respect arose by way of indemnity upon the stipulation of the express company.

(Argued December 1, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made September 20, 1887, which affirmed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial made upon the minutes.

This action was brought to recover damages for the death of Henry F. Brewer, plaintiff's intestate, alleged to have been caused by defendant's negligence.

The facts, so far as material, are stated in the opinion.

D. C. Robinson for appellant. The motion for a nonsuit should have been granted, as the contract exempted the railroad company from liability. (*Blair v. E. R. Co.*, 66 N. Y. 313; *Seybolt v. N. Y., L. E. & W. R. R. Co.*, 95 id. 573; *Steinon v. N. Y. C. & H. R. R. Co.*, 32 id. 333.)

Frederick Collin for respondent. The intention of the contracting parties was not to destroy the rights of the intestate in

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case of injury while acting as a messenger, but to indemnify the railway company against the damages resulting to it from the enforcement of such rights. (*Mynard v. S., etc., R. R. Co.*, 71 N. Y. 180; *McElwain v. E. R. Co.*, 21 Wkly. Dig. 21; *Blair v. E. R. Co.*, 66 N. Y. 313; *Magnin v. Dinsmore*, 56 id. 168; *Nolton v. W. R. R. Co.*, 15 id. 444; *Holsapple v. R., W. & O. R. R. Co.*, 86 id. 275; *Nicholas v. N. Y. C. & H. R. R. R. Co.*, 89 id. 370; *Stinson v. N. Y. C. R. R. Co.*, 32 id. 333; *Black v. G. T. Co.*, 55 Wis. 319.) The contract does not, as a matter of law, exempt the defendant from liability for the negligent killing of the intestate. (*Bissell v. N. Y. C. R. R. Co.*, 25 N. Y. 442-449; *Seybolt v. N. Y., L. E. & W. R. R. Co.*, 95 id. 562-575.) There was nothing in the contract relations existing between the express company and the messenger authorizing the company to debar the messenger from any claim to damages for injuries to his person by the negligence of the railway company. (*Nolton v. W. R. Co.*, 15 N. Y. 444; *Seybolt v. N. Y., L. E. & W. R. R. Co.*, 95 id. 562; *Blair v. E. R. Co.*, 66 id. 313; *Kenny v. N. Y. C. & H. R. R. R. Co.*, 54 Hun, 143; *Youmans v. C. C. S. N. Co.*, 44 Cal. 71.)

BRADLEY, J. The plaintiff's intestate was an express messenger in the service of the United States Express Company, and as such occupied the express car in a train upon the defendant's railroad on January 23, 1881, when a portion of the train, including such car, was derailed, and he lost his life. The jury found that this was occasioned solely by the negligence of the defendant. The principal ground alleged, by way of defense, was that the defendant was exempt from liability by virtue of an agreement made between the Erie Railway Company and the express company, in 1877, to the rights of that railway company in which and to its franchises the defendant had succeeded. That was a contract for the transportation of property for the express company, and for that purpose the railway company agreed to provide suitable facilities.

The third clause of the contract, upon which the main question for consideration arises, was as follows: "The railway

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company agrees that between all stations on its main and leased lines and branches it will carry free of charge to said express company, its messengers, wagons, horses and grain, not exceeding three car-loads in any one month, and as well all packages of money, bank-notes, bonds, gold, bullion, jewelry and other precious articles, including the safes in which such packages shall alone be transported; and in consideration of such free carriage said express company hereby assumes all transportation risks and other liabilities whatsoever arising in respect thereof, and agrees to fully indemnify and protect the railway company therefrom."

This provision, in its relation to property which the railway company should transport pursuant to the contract, did not have the effect to relieve or indemnify it against liability for loss or injury which should be occasioned by its negligence. The intent to accomplish that purpose cannot be inferred from general words, but must be distinctly expressed in the contract with the common carrier. (*Magnin v. Dinsmore*, 56 N. Y. 168; *Mynard v. Syracuse, etc., R. R. Co.*, 71 id. 180; *Nicholas v. N. Y. C. & H. R. R. Co.*, 89 id. 370.)

It is said that this provision of the contract, in its application to the express messenger referred to in it, is not entitled to such application and effect; and that by it the defendant was exempt from liability for his personal injury and death, although caused by its negligence. It is true that a carrier of persons is not subjected by law to the obligations of a common carrier, nor is a carrier of persons a common carrier in the strict sense of the term applicable to it. While the latter, in the transportation of property, is an insurer of its safe transit, when the obligation is not qualified by contract, the negligence of the carrier of persons is essential to liability for injury to them. The settled doctrine in this state is that a carrier of persons as well as of property, and known as a common carrier, may, by contract, have protection against liability for injury caused by its negligence. (*Wells v. N. Y. C. R. R. Co.*, 24 N. Y. 181; *Bissell v. N. Y. C. R. R. Co.*, 25 id. 442; *Poucher v. N. Y. C. R. R. Co.*, 49 id. 263; 10 Am. R. 364.) But whether in view of the fact that the liability of a

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carrier to a passenger can rest on no ground less than that of negligence, renders it unnecessary to make the stipulation of the contract definite and distinct in that respect for its relief from liability, is not necessarily the subject of inquiry or consideration on this review. It may, however, be observed that in those cases where the defense has been sustained the contract has, by its terms, plainly guarded the carrier against liability for injury resulting from its negligence. The provision before mentioned of the contract contains no stipulation expressly exempting the railway from liability arising from that cause. But in a later clause of the contract it was provided that "The railway company agrees to assume the usual responsibility of railway companies in transporting express freights, such responsibility being, however, expressly limited to cases of negligence in running and handling its trains. But in no event, whether of negligence or otherwise, shall the railway company be responsible, and it is hereby released from, and the express company hereby assumes, all liability for money, bank-notes, jewelry, bullion and precious packages hereinabove provided to be carried by the railway company free of charge." This is the only provision of the contract specifically expressing any relief from the consequences of the negligence of the last-named company; and it may be that its protection from liability from such cause was intended to be limited by and made dependent upon that clause. And in that view the provisions of the third clause of the contract may have been intended to furnish the means of indemnity to the railway company so far as the express company assumed the risk and undertook to indemnify and protect it from liability. These considerations bear upon the construction of the last-mentioned provision of the contract, and if the messenger had been advised of it, the question may have arisen whether, in its application to him, the liability of the defendant would be deemed to have been any less qualified than in its relation to the property to which, in common with him, it there related. That is to say, whether the general words apparently applied to the property and to him without dis-

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crimination, were entitled to a more extended import as to the messenger than could be given to them in their application to the other objects to which they, in the same connection, also equally related. It, however, does not appear that the plaintiff's intestate had any knowledge or information of the provisions of the contract between the two companies. When he entered into the service of the express company he assumed the ordinary hazards incident to that business in his relation to that company, but there was no presumption or implied understanding that the messenger took upon himself the risks of injury he might suffer from the negligence or fault of the defendant. He was in no sense the employe of the defendant, nor could he, without his consent, be subjected to the responsibilities of that relation. (*Mo. Pacific Ry. Co. v. Ivy*, 17 Texas, 409; 10 Am. R. 758.) He was lawfully in the car, having the charge of the property and business there of the express company under its employment; and although he paid no fare to the defendant, was carried by virtue of no contract made by him personally with the latter, and must have understood that he was there pursuant to some arrangement of his employer with the defendant, he was not necessarily, by that fact, chargeable with notice of the provisions in question of the contract. Presumptively he was entitled to protection against personal injury by the negligence of the defendant. (*Blair v. Erie Ry. Co.*, 66 N. Y. 313; *Nolton v. Western R. R. Co.*, 15 id. 444; *Smith v. N. Y. C. R. R. Co.*, 24 id. 222; 29 Barb. 132; *Collett v. L. & N. W. R. Co.*, 16 Adol. & E. 984.) And it is not seen how Brewer could, without his knowledge or consent, be placed in such relation to the defendant as to relieve it from liability to him for the consequences of its negligence affecting him personally. His contract of employment with the express company for its service did not, so far as appears, impose upon him such hazards, nor was he chargeable with the stipulations in the contract between those companies except so far as they, through notice to him or otherwise, entered into that, pursuant to which he went into or remained in the service of the express company. The neg-

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ligence of the defendant was the violation of its duty. It was the want of the care to which the plaintiff's intestate was entitled for his protection. This duty and such right did not depend or rest upon contract, but upon the relation as carrier of the plaintiff, and the care which the defendant as such was required to exercise. It is violated duty that furnishes the ground of an action for negligence, and where there is no duty there is no liability for such cause. We are unable to see in principle any legal support for the proposition that a person entering into a contract of service with one employer may, without his knowledge or assent, be made to assume the hazards of a service conducted by another, and in which he is not engaged, and be personally subjected to the consequences of the negligence of the latter without remedy against him. No such question was in the case of *Seybolt v. N. Y., L. E. & W. R. R. Co.* (95 N. Y. 562), which arose out of the same disaster.

The contract between the companies did not purport to relieve the defendant from its duty to exercise due care for the protection of the messenger. Nor did the defendant take from it any right to disregard such duty. But whatever right to relief from the consequences of its negligence in that respect the defendant derived from the contract, arose by way of indemnity upon the stipulations of the express company. These views lead to the conclusion that the question of negligence (which fact was supported by evidence) was properly submitted to the jury. And the charge of the court to them, "that the extent of the defendant's obligation to the deceased was to use ordinary care," was as favorable to the defendant as could be required by it. The deceased was a passenger, and, therefore, the refusal of the court to charge to the contrary was not error. (*Blair v. Erie Railway Co.*, 66 N. Y. 313.) The location of the express car in the train did not deny to him the benefit of that relation.

No other question requires consideration.

The judgment should be affirmed.

All concur, except FOLLETT, Ch. J., not sitting.

Judgment affirmed.

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JAMES E. OUTWATER, Respondent, v. JEREMIAH MOORE,
Appellant.

Plaintiff's complaint alleged, in substance, that defendant had taken down a line fence between the lands of the parties and erected a new fence upon plaintiff's land, also that he had raised a dam on his land to a greater height than he was entitled to, thereby causing the water to overflow upon and injure plaintiff's lands. The relief asked for was that the defendant be required to return the fence to the proper line, to lower his dam, and for damages. The trial court found as a fact that the fence built by defendant was not upon plaintiff's land, but upon the line between his and defendant's land and marks the same; it found in favor of plaintiff as to the dam, and as a conclusion of law that the dam should be lowered as specified. The court refused to find, as a conclusion of law, as requested by defendant, that the latter was entitled to a judgment declaring that the fence in question "is not upon plaintiff's land, but upon the line between plaintiff's and defendant's lands." The judgment recited none of the facts found, except such as were favorable to plaintiff, and it contained no adjudication upon the issue relating to the division fence. *Held*, error; that the issue as to the fence was a material one, and defendant was entitled to the fruit of the finding of facts in his favor by having such an adjudication made as would, by matter of record, estop the plaintiff from reopening the controversy; and that as the complaint could not be dismissed upon the merits, plaintiff having succeeded in part, defendant's only protection was an express direction for judgment in his favor, to the extent required by the facts found. *Also held*, that the error might be corrected on appeal without ordering a new trial, it being the duty of the appellate court to declare the law and apply it to the facts already found, and thus protect the parties from further litigation.

(Argued December 1, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 13, 1888, which modified, and affirmed as modified, a judgment entered upon the decision of the court at Special Term; also appeal from so much of said order as modified, and affirmed as modified, an order of Special Term denying a motion to conform the judgment to the findings and for other relief.

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The plaintiff alleged in his complaint that on the 7th day of June, 1883, he owned certain premises in the town of Red Hook, Dutchess county, and that the defendant on or about that day entered thereupon, took down a fence that stood thereon and removed the same; that he also "then and there erected another fence, and said new fence was not erected upon the true division line between the land of plaintiff and defendant, nor upon the line of the old fence, but upon the land of the plaintiff, without any right or authority in the defendant so to do, and dug holes, trod down grass and otherwise injured plaintiff's premises to his great damage (amounting to) twenty-five dollars."

As a second cause of action plaintiff alleged that in 1882 the defendant erected a dam across a creek that flowed through said premises, upon the site of an old dam, "and where he had a right to erect it to a certain height," but that he "wrongfully raised the same two feet higher than the old dam or than he had a right to raise or build the same," and thereby caused the water to overflow and injure the said lands. The prayer for relief was that the defendant be compelled to lower his dam to its proper level, return the fence to its proper line and pay the plaintiff the sum of \$125 as damages. The answer was a general denial.

The action was tried before the court without a jury, and the justice presiding found the facts in favor of the defendant upon the first issue, and in favor of the plaintiff upon the second, and, as a conclusion of law, "that the dam erected across said creek or stream be lowered fourteen inches throughout its whole length by defendant on or before May 15, 1884, and that plaintiff recover from the defendant the sum of six cents damages and his costs and disbursements in this action." The judgment subsequently entered recited none of the facts found, except such as were favorable to the plaintiff, and it contained no adjudication upon the issue relating to the division fence. Thereupon the defendant, upon due notice, moved at Special Term for relief in various forms, and among other things, "for an order that the judgment herein

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be made to follow and conform to the findings herein as to the line fence between the parties," but the motion was denied, with ten dollars costs. Upon appeal to the General Term both from the judgment and from the order denying said motion, the former was so modified as to require the defendant to lower his dam ten inches instead of fourteen, and so as to provide that the plaintiff should recover neither costs nor disbursements of the action. The order was also modified by striking out the award of costs and both the judgment and order, as thus modified, were affirmed without costs to either party.

Further facts are stated in the opinion.

Homer A. Nelson for appellant. Defendant's exception to the admission in evidence and use of the deed from Jacob W. Moore, which was conceded to be no part of the chain of title of either party to the action, without proof of its accuracy in any respect were well taken. (*Duryea v. Vosburgh*, 121 N. Y. 68; *Braque v. Lord*, 67 id. 495-499.) To sustain a verdict when evidence has been erroneously admitted, it must very clearly appear that no injury could possibly have resulted from the error. (*Duryea v. Vosburgh*, 121 N. Y. 68.)

Daniel W. Guernsey for respondent.

VANN, J. The learned trial justice found as a fact "that the fence, mentioned in plaintiff's complaint and alleged to have been built by defendant on plaintiff's land, is not upon plaintiff's land, but upon the line between plaintiff and defendant and marks the same," but he refused to find, upon the request of the defendant, as a conclusion of law, "that the defendant is entitled to judgment herein, declaring that the fence mentioned in the complaint is not upon the land of plaintiff, but is upon the line between plaintiff's and defendant's lands." The defendant excepted to this ruling and now insists that he has been denied a substantial right by the refusal of the court to find the conclusion of law required by the facts as

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established, and to adjudge that the fence in question is upon the true line of division between the lands of the parties.

The issue relating to the location of the fence was tendered by the plaintiff, accepted by the defendant and thoroughly tried by both parties without question as to form or remedy. It was a material issue upon which the first cause of action set forth in the complaint mainly depended. When the trial court found the facts in favor of the defendant, he was entitled to the fruit of the finding by having the law properly applied, and such an adjudication made as would, by matter of record, estop the plaintiff from reopening the controversy. It, therefore, became the duty of the court, upon the request of the defendant seasonably made, to direct such a judgment in his favor as the established facts required, so that there might be authentic, permanent and indisputable evidence of record as to his rights. As the complaint could not be dismissed upon the merits, because the plaintiff succeeded on the second cause of action, the defendant could have adequate protection only by an express direction for judgment in his favor to the extent that the facts were found in his favor. This the learned trial judge, doubtless through inadvertence, refused to do, although a request in proper form was presented to him at the proper time. Fortunately this error is corrigible upon appeal without ordering a new trial, as it is the duty of the appellate court to declare the law and apply it to the facts already found, and thus protect the parties from the evil of further litigation.

The judgment, therefore, should be so modified as to adjudge that the fence mentioned in the complaint is not upon the lands of the plaintiff, but is upon the line between the lands of the plaintiff and defendant, and as thus modified, affirmed, but, as the defendant's appeal was general and there is no other question requiring consideration, without costs in this court to either party.

All concur.

Judgment accordingly.

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SARAH ELIZABETH GRIFFIN, Appellant, v. CHARLES D.
SHEPARD et al., Respondents.

C., by his will, devised one-third of his real estate to his son J., one-third to his son J. C., and the remaining other third to J. C., provided that he should survive his wife or should have a lawful child who should live to the age of twenty-one; in case neither of these events happened, then he gave the said one-third to J. J. deeded all his estate, right and interest in certain premises of which the testator died seized to J. C.; the latter died before his wife, and he had no child who lived to the age of twenty-one. In an action of ejectment, *held*, that J. had a future expectant estate in the one-third, not absolutely devised to him or his brother, which was alienable, and that this estate, with the one-third absolutely devised to him, was conveyed by his deed to J. C. (1 R. S. 723, § 10, 725, § 35.)

Reported below, 40 Hun, 345.

(Argued December 8, 1890; decided January 14, 1891.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 11, 1886, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury and granted a new trial.

This was an action of ejectment. Defendant Shepard claimed the premises in question as owner, and defendant Cornell claimed a right of possession as tenant under said Shepard.

The action relates to a tract of land in the town of Scarsdale in the county of Westchester, which was part of a tract of land owned, at the time of his death by Stephen Griffin. Griffin died October 18, 1847, leaving his widow (who died in October, 1860), his sons Joseph and John C. Griffin and other children. He left a will, which was dated September 9, 1847, and was proved before the surrogate of Westchester county December 20, 1847, whereby he devised his real estate to his said sons Joseph and John C. Griffin in the following language: "I give, devise and bequeath unto my son Joseph Griffin, one third of all my estate, real and personal to hold to him, the said Joseph Griffin, his heirs and assigns forever; provided my son John C. Griffin shall survive his present wife Deborah L. Griffin, then in

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that case I give, devise and bequeath unto my said son John C. Griffin, the remaining two-thirds of all my estate real and personal to hold to him, the said John C. Griffin, his heirs and assigns forever. Or provided that my said son John C. Griffin shall have a lawful child by his, the said John C. Griffin's, lawful wife, and the said child shall live to the age of twenty-one years, then in that case I give, devise and bequeath unto my said son John C. Griffin the said two-thirds of all my estate real and personal, to hold to him, the said John C. Griffin, his heirs and assigns forever.

"But provided that if my said son John C. Griffin, shall die leaving his present wife Deborah L. Griffin, as survivor, then in that case I give, devise and bequeath unto my said son John C. Griffin, one-third only of all my estate real and personal, to hold to him the said John C. Griffin, his heirs and assigns forever. And the remaining one-third of all my estate real and personal, I give, devise and bequeath unto my aforesaid son, Joseph Griffin, to hold to him, the said Joseph Griffin, his heirs and assigns forever."

No question has been made that by this will one-third of the real estate (including the premises in question) was vested absolutely in Joseph Griffin and one-third in John C. Griffin. The only controversy in this action relates to the remaining one-third.

The findings of the trial court show that John C. did not have a child who lived to the age of twenty-one years, and that he did not survive his said wife Deborah, and also, that after the death of Stephen Griffin, said Joseph and his wife executed to John C., for an expressed consideration of \$1, a deed dated February 6, 1851, which was duly recorded February 12, 1851, whereby they did "remise, release and quit-claim, unto the said party of the second part and to his heirs and assigns forever" the premises in question, "and also all the estate, right, title, interest, property possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to the above-described premises."

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Afterward, and on the 15th of September, 1864, said Joseph executed to said John C. a deed which was duly recorded October 15, 1864, whereby he did, for an expressed consideration of \$1, "bargain, sell and quit-claim unto the said John C. Griffin and to his heirs and assigns forever all my right, title, interest, estate, claim and demand, both at law and in equity, and as well in possession as in expectancy of, in and to all that certain parcel of land situated in the town, county and state aforesaid, being an estate which has heretofore been quit-claimed by me to said John C. Griffin, a part of which was given under my hand and seal the 6th day of February, in the year 1851," describing the land conveyed including the premises in question.

Further facts appear in the opinion.

William Romer for appellant. The testator devised an undivided one-third of his farm to his son, Joseph Griffin, and an undivided one-third thereof to his son, John C. Griffin. The conveyance made by John C. Griffin and Joseph Griffin to each other, conveyed each the undivided one-third part of said land, only devised as aforesaid, and held by them as tenants in common. Neither John C. Griffin nor Joseph Griffin had an estate in the remaining undivided one-third, or any interest therein which they could alienate. They had therein only a naked possibility not coupled with an interest, which could not be alienated either at common law or by the Revised Statutes. (4 Kent's Comm. 262; *Jackson v. Waldron*, 13 Wend. 178; *Pelletreau v. Jackson*, 11 id. 123; 2 R. S. chap. 1, § 7.) The estate conveyed by the will of Stephen Griffin to John C. Griffin or Joseph Griffin, as to the remaining one-third was not a future contingent estate in expectancy. (3 R. S. art. 1, tit. 2, chap. 1, § 8; *Moore v. Littell*, 41 N. Y. 91-94.) The interests of John C. and Joseph Griffin, as to two-thirds of the estate, were those of executory devises. (2 Washb. on Real. Prop. 367, 569, 666; 4 Kent's Comm. 262; 4 Paige, 293; *Hennessey v. Patterson*, 85 N. Y. 98.) The conditions mentioned in the will of Stephen Griffin as to the vesting of the remaining two-thirds, after devise to Joseph, were conditions

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precedent. (*Coster v. Butler*, 63 How. Pr. 311; 11 Wend. 259; *Bushnell v. Carpenter*, 92 N. Y. 270; *Vincent v. Newhouse*, 83 id. 505; *Shipman v. Rollins*, 98 id. 311; *Kenyon v. See*, 94 id. 563; *Dunning v. Kettell*, 29 Alb. L. J. 57; *Loder v. Hatfield*, 71 N. Y. 92.) The deeds from Joseph Griffin to John C. Griffin were void as to this undivided one-third interest. There was no ascertained person who could take a valid assignment of the executory devise. (2 Washb. on Real Prop. [3d. ed.] 565, 663; 2 Prest. Com. 276; Smith on Real Prop. 248; *Pond v. Bergh*, 10 Paige Ch. 141; *Williamson v. Field*, 2 Sand. Ch. 533; *Grout v. Townsend*, 2 Den. 336; *Post v. Post*, 47 N. Y. 42; *Miller v. Emans*, 19 id. 384; *Moore v. Littel*, 41 id. 66; *Jackson v. Winslow*, 9 Cow. 1; *McCrackin v. Wright*, 14 Johns. 194; *Jackson v. Hubbell*, 1 Cow. 613.) As against a remainderman there cannot be an adverse possession. (3 Washb. on Real Prop. 132, chap. 2, §§ 7-30; 16 Pick. 137; 17 id. 255; *Coleman v. M. B. I. Co.*, 94 N. Y. 229; *Stevens v. Hauser*, 39 id. 302; *In re Dept. of Parks*, 73 id. 560; *Hallas v. Bell*, 53 Barb. 247; *Calver v. Rhodes*, 87 N. Y. 348; 73 id. 360; 72 id. 94; 79 id. 390; *Crary v. Goodman*, 22 id. 170; *Thompson v. Mayor, etc.*, 12 id. 115; *Clark v. Hughes*, 13 Barb. 147; 2 R. S. 691, § 167.)

Sidney Ward for respondents. In an action of ejectment the plaintiff must recover upon the strength of his own title, and he cannot rely on any supposed or actual weakness of his adversary's title. (*Roberts v. Baumgarten*, 110 N. Y. 380, 385.) Plaintiff is barred by the deeds from Joseph to John C. Griffin. (*Moore v. Littel*, 41 N. Y. 66; *Ham v. Van Orden*, 84 id. 257, 270; *Hennessy v. Patterson*, 85 id. 91, 101, 103; *Beardsley v. Hotchkiss*, 96 id. 201; *Nellis v. Nellis*, 99 id. 505, 516; *In re N. Y., L. & W. R. Co.*, 105 id. 89, 96; 4 Kent's Comm. 272; *Roe v. Vingut*, 117 N. Y. 204, 211, 212; *Miller v. Emans*, 19 id. 384; *Everitt v. Everitt*, 29 id. 39, 77, 78; *Field v. Mayor, etc.*, 6 id. 179; *Williams v. Ingersoll*, 39 id. 508; Story's Eq. Juris. § 1040.) Any defect which affects the deeds from Joseph Griffin affects also the

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title of the plaintiff, and she, therefore, cannot recover. (*Hennesy v. Patterson*, 85 N. Y. 91.) The deed to plaintiff and also the deed to her grantor, were both made while the land was in adverse possession, and were, therefore, both void, and the plaintiff cannot maintain this action. (2 R. S. chap. 1, § 147; *Sands v. Hughes*, 53 N. Y. 287, 295; *Towle v. Remsen*, 70 id. 303; *Crary v. Goodman*, 22 id. 170; *Jackson v. Dumont*, 9 Johns. 55; *Chamberlain v. Taylor*, 92 N. Y. 348.)

POTTER, J. No question is made that Joseph Griffin and John C. Griffin, the sons of Stephen Griffin, each derived title under the will of the latter to one equal undivided third part of the premises described in the complaint. The contention is in relation to the title of the remaining third, and that depends upon the validity and effect to be given to the deed of quitclaim from Joseph to John C. Griffin, on the 6th day of February, 1851, and the deed confirmatory of that deed from Joseph to John C. Griffin, bearing date September 15, 1864. If those deeds, one or both, are valid and effectual, the defendants, who claim under John C., are entitled to the premises, but if not valid and effectual, the plaintiff claims to be entitled to one undivided third part of said premises, or, in other words, the question in controversy is, which of the parties to this action is entitled to the disputed one undivided third part of the premises; for the plaintiff's contention is to the effect that the deed from Joseph to John C. was void, and that the title to that one undivided third remained in Joseph, to which plaintiff has succeeded. Joseph Griffin assumed to convey his estate, or interest in the premises in question, to John C. Were his deeds effectual for that purpose?

By the terms of the will, Stephen Griffin, the testator, devised this one-third to John C. in fee in either of two events, viz., that John C. should survive his then wife Deborah, or should have a child by his wife Deborah, who should live until it attained the age of twenty-one years, but if neither of these events should transpire, then this one-third should go to Joseph

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Griffin, his heirs and assigns forever. Neither event transpired. John C. did not survive his wife Deborah, and did not have by his wife Deborah a child that lived till it was twenty-one years of age. Joseph Griffin died in 1868, and devised all his estate to his son, his only heir, Richard H. W. Griffin. John C. Griffin died in 1873, leaving no children, and devising his estate, subject to a legacy of \$2,000, to his adopted daughter, the income of the remainder of his estate to his wife for life, and also to his wife one-half of such remainder in fee, and the defendants have succeeded to the estate so devised.

What estate did Joseph Griffin take in the disputed one-third? Under the will of Stephen, this one-third went to John C. until it was determined that his wife Deborah did not survive him, or that they should not have a child, who should live till it was twenty-one years of age. Deborah did survive John C., who died in 1873. His death before the death of Deborah determined one contingency. The other contingency was also determined certainly within the year succeeding the year 1873, and probably several years before that.

The contention upon the part of plaintiff is that the interest or estate of Joseph was a mere possibility, and so not alienable. The contention of the defendants is that the estate of Joseph was an expectant estate and so alienable under sec. 35, ch. 1, title 2, part 2, R. S., which provides that "expectant estates are descendible, devisable and alienable in the same manner as estate in possession." (*Lawrence v. Bayard*, 7 Paige, 76; *Pond v. Bergh*, 10 id. 140; *Beardsley v. Hotchkiss*, 96 N. Y. 201, 213, 214; *Crooke v. County of Kings*, 97 id. 421, 449; *Ham v. Van Orden*, 84 id. 257, 270; *Miller v. Emans*, 19 id. 384.)

The question for solution, therefore, is, what was the character of the estate in this one-third devised to Joseph upon the failure of these contingencies to occur?

The chapter of the Revised Statutes above referred to contains the definitions and nomenclature of the various estates in land. "An estate in expectancy is where the right to the possession is postponed to a future period." (§ 8, R. S. *supra*;

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Ham v. Van Orden, 84 N. Y. 257.) Judge DANFORTH in the opinion in that case, says: "It does not seem necessary to determine whether an interest at once vested in her, or whether time and the happening of the specified event were of the substance of the gift, and prevented it from vesting until the event happened. In either case she acquired an interest (R. S. 723, art. 1, tit. 2, part 2, chap. 1, § 10), although the right to possession was postponed to a future period and depended upon the contingency of the death of Wessel without children. This did not prevent the creation of the estate, but rendered it liable to be defeated. (Art. 1, chap. 1, tit. 2, part 2, vol. 1, R. S. 725, § 31.) It was an estate in expectancy (§ 9, p. 725, id.), however, and could not be destroyed by any alienation, or other act of Wessel or his trustee (§ 32, id.), and upon his death, without children, would become absolute in the plaintiff. It was, therefore, alienable by her to the same extent as if in possession (§ 35, id.), and whether it be deemed vested or contingent." (*Moore v. Littell*, 41 N. Y. 66; *Crooke v. County of Kings*, 97 id. 421; *Hennessey v. Patterson*, 85 id. 91; *Nellis v. Nellis*, 99 id. 505.)

And estates in expectancy are divided into future estates and reversions. (§ 10, R. S. *supra*.) "A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination by lapse of time or otherwise, of a precedent estate created at the same time." (*Crooke v. County of Kings*, 97 N. Y. 449.) "Future estates are either vested or contingent. They are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are contingent when the person to whom or the event upon which they are limited to take effect remains uncertain." (§ 13; 97 N. Y. *supra*; *Beardsley v. Hotchkiss*, 96 id. 203-214.)

From these definitions and characteristics of estates it follows that John C. had an estate in possession and in fee until the happening of at least one of the events specified in the will of Stephen; and Joseph also had a future expectant

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estate in the same one-third if said events or contingencies should not happen, and the estates of both of them were created at the same time and under the will of Stephen, their father. (§ 10, R. S. *supra*.)

Joseph and John C. together owned an estate in fee, and could, at the time of the execution of the deeds from Joseph to John, together have conveyed to a third person a present estate of inheritance, and it seems to us very clear that what each of them might have conveyed to a third person, he might convey to the other and with the same result, viz., an estate of inheritance. I do not perceive upon what theory the trial court awarded a recovery to the plaintiff of the undivided half of the premises. Assuredly the deed from Joseph to John C. conveyed the one-third which was devised to Joseph in fee. But this consideration is of no moment, nor is there any occasion to consider any other question, having reached the result that the disputed one-third was alienable and was conveyed by Joseph Griffin to John C.

The order should be affirmed and judgment absolute with costs should be awarded to defendants.

All concur.

Order affirmed and judgment absolute for defendants.

NATHAN COBB et al., Respondents, v. LUKE WELLS, Appellant.

In an action to recover for iron and materials alleged to have been furnished one H. by C., H. & Co., plaintiffs' assignors, upon defendant's order, testimony was given to the effect that the bookkeeper of said firm daily weighed the iron, took an account of the work and made entries thereof in the firm books; the correctness of the items taken by him and to whose account they were applicable was proved by the foremen. Some of the members of the firm verified the charges, and evidence of persons who had made settlements of their accounts upon the books was given as to the correctness of the accounts kept upon them. The books were then offered and received in evidence under defendant's exception. *Held*, no error.

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Defendant's order was that C. H. & Co. deliver to H. "what materials * * * he may want for one hundred pumps." Defendant offered to prove the cost per pump of the only kind of pump for which materials were furnished, including all materials furnished for and the work done upon them, and that the amount of the claim largely exceeded the cost. This was excluded. *Held*, error.

(Argued December 8, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 17, 1888, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to recover for materials and patterns alleged to have been furnished by Cobb, Herrick & Co. to one Howe upon an order made by the defendant in the following form :

"MESSRS. COBB & HERRICK :

"GENTS — Please let the bearer, Mr. Howe, have what materials, including patterns, he may want from your shop for one hundred pumps, and I will pay same within sixty days from receipt of goods, and oblige
LUKE WELLS."

The business of the firm of Cobb, Herrick & Co. was manufacturing machinery, including foundry and pattern work, and the plaintiffs were assignees of the claim in question. The claim as alleged was upwards of \$1,000. The referee directed judgment for the amount of the claim, with interest, less some payments found to have been made upon it by Howe.

Edward H. Burdick for appellant. The order was a special contract, clear and explicit in its terms, and could not be enlarged or extended by implication, and the defendant was, and is, entitled to a construction limiting his liability to materials and patterns for 100 pumps. (2 Pars. on Cont. 4; *White v. Hoyt*, 73 N. Y. 512; *Hunt v. Smith*, 17 Wend. 179; *Walrath v. Thompson*, 6 Hill, 540; 2 N. Y. 185.) No extrinsic evidence was necessary to explain the order. (*Witty*

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v. *Matthews*, 52 N. Y. 516; *Westcott v. Thompson*, 18 id. 366, 367; *Giles v. Comstock*, 4 id. 270; *Norton v. Woodruff*, 2 id. 153; *Church v. Brown*, 21 id. 329; *Ward v. Stahl*, 81 id. 406.) The order being definite in terms and limitations, the plaintiffs' firm was bound to know what they could furnish under it, and to keep within the limits. If they exceeded those terms or limits they did so at their peril. (*Downer v. Thompson*, 6 Hill, 208; *N. R. Bank v. Aymar*, 3 id. 262; *Stainer v. Tysen*, Id. 279.) There was no agency on Howe's part. But if it is so claimed by plaintiffs the situation is not changed. (*Oliphant v. McNair*, 41 Barb. 446; *Bumpstead v. Hoadley*, 11 Hun, 487; *Bd. of Suprs. v. Bates*, 17 N. Y. 242; *Nixon v. Palmer*, 8 id. 398; *Craighead v. Peterson*, 72 id. 279.) The referee erred in receiving plaintiffs' books in evidence. (*Larue v. Rowland*, 7 Barb. 107; *Gould v. Conway*, 59 id. 355; *Merrill v. I., etc., R. R. Co.*, 16 Wend. 587; *Vosburgh v. Thayer*, 12 Johns. 461; *Corning v. Ashley*, 4 Den. 354.)

W. S. Andrews for respondents. The finding that the articles furnished Howe were covered by the order in question is sustained by the evidence. (*Smeltzer v. White*, 92 U. S. 390.) The books of the plaintiff were properly admitted in evidence. (*Mayor, etc., v. S. A. R. R. Co.*, 102 N. Y. 572; *McGoldrick v. Traphagen*, 88 id. 334.)

BRADLEY, J. The liability of the defendant for the articles furnished to Howe arises upon and is limited by his order. The limitation by the terms of the order does not relate to the character or condition of the materials, but to such as Howe might want for one hundred pumps. The firm of Cobb, Herrick & Co. had a machine shop and the facilities for making and preparing the materials for use. And the service requisite to their adaptation for use in the construction of the pumps, fairly came within the import of the order. The main features of the account were for pattern-work, machine-work, castings and wood-work. There was also a small amount for

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other materials. If the preparation and furnishing the patterns and materials called for by Howe under the defendant's order for pumps not exceeding one hundred, were correctly and fairly represented by the account of Cobb, Herrick & Co., as found by the referee, the defendant was chargeable with the amount of it. There is evidence tending to prove that this account was for patterns and materials prepared and furnished to Howe pursuant to his call for them; that they were provided wholly for the construction of pumps after the order was made, and during the period ending with January 14, 1878; and that the pumps made by him during that time did not exceed one hundred in number. Whether the defendant's order was operative during that period, and whether the patterns and materials charged in such account were or could have been prepared and furnished for or used in the construction of that number of pumps, were facts controverted by the evidence on the part of the defendant to the effect that the order was not made until a year after the time it purported to bear date; and that the materials so charged and allowed by the referee were largely in excess of those requisite to or used in the construction of one hundred pumps. There was, however, evidence tending to support the finding of the referee; and the comparative weight of it is not here for consideration. The account of materials and of the work of preparing them and the patterns was, as were other accounts, entered and kept in books of Cobb, Herrick & Co., and for details of the account in question, reference was made to such entries by the evidence. The books were received in evidence, subject to the exception of the defendant. There were weight-books and time-books, so called, and another to which the entries on those books were taken. To prepare the way for the introduction of these books, it was proved that the bookkeeper daily weighed the iron and took an account of the work, and made the entries in the books; and in respect to the correctness of the items so taken by him, and as to whose account they were applicable, the evidence of the foremen having charge of the work and employes in the shops, was given as well as that of some of the

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members of the firm by way of verification of the charges as so entered; and further evidence of persons who had made settlements with the firm of their accounts upon the books was given bearing upon the character and correctness of the accounts kept upon them. The firm had in their service a large number of workmen; and it was the duty of the book-keeper, aided by the foremen, to ascertain what the work was, and for whom it was done, and make entries of it daily in the books. The method by which the evidence tended to prove this was accomplished, was such as to render competent as evidence, the entries in the books within the rule applied in *Mayor, etc., of N. Y. v. Sec. Av. R. R. Co.* (102 N. Y. 572); *West v. Van Tuyl* (119 id. 620); *In re McGoldrick v. Trap-hagen* (88 id. 334). And the question of its weight was for the referee.

Mr. Howe was the inventor of what was called a three-cylinder pump and of one later, known as a two-cylinder pump. And there was evidence tending to prove that they were the only kind of pumps for which materials were furnished by Cobb, Herrick & Co., within the time before mentioned. Then the defendant offered to prove the cost per pump of the former and including all the materials furnished for and the work done upon them by that company during the period from June 1, 1877, to January 14, 1878; also that the amount of the account in question exceeded by several hundred dollars, the cost of one hundred pumps ready for the market. The evidence was excluded upon the plaintiffs' objections, and exceptions were taken. And a like offer and ruling and exception were made and taken in respect to the two-cylinder pump. There was evidence to the effect that besides putting the prepared materials together, the painting of the pumps constituted substantially all the work of completion. The witness appeared to be qualified to give the evidence, and the offers were in such form that it must be assumed that, if admissible, the facts would have been proven in a proper manner. The controversy had relation to the quantity of materials and the extent of the work performed by that firm

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within the limits of defendant's order ; and upon that subject there was a conflict in the evidence of the parties. The account upon which the plaintiffs sought to recover consisted of numerous items for both materials and work in preparing them. The question was not simply what was furnished and done for Howe or for him and Cowles, who was interested with Howe in the business, but for what the defendant was chargeable by virtue of his order. And that depended upon the call made upon Cobb, Herrick & Co. for and the supply by them of materials and services within the limitation of the order. This was measured by number of pumps. It would, therefore, seem proper to prove the cost to Howe and Cowles of all the materials and work supplied and performed by the plaintiffs' assignors for and upon each pump. In that view it was competent for the defendant, if he could, to prove that the aggregate expense of the construction of the pumps, not exceeding the prescribed number, for which such materials and work were supplied and done, was less than the amount of the plaintiffs' alleged claim founded upon such account. This would have been a step on the way to proof tending to show the extent of the defendant's liability. The value of the evidence offered or the weight of it is not the subject of consideration here. It is sufficient that the evidence was competent and that the defendant may have been prejudiced by its exclusion. The ruling excluding the evidence was error.

No other exception appearing in the record was well taken.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except FOLLETT, Ch. J., and VANN, J., not sitting.
Judgment accordingly.

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ELIPHALET WOOD, Appellant, v. VALENTINE L. LARY et al.,
Respondents.

In every case triable by the court without a jury, or by a referee, if evidence is presented, there must be a decision of the court or a report of the referee stating separately the facts found and the conclusions of law based thereon, as required by the Code of Civil Procedure (§ 1022) in the absence thereof the judgment cannot be reviewed.

It seems, however, this rule does not apply where the complaint was dismissed before the introduction of testimony, or where judgment was rendered on the pleadings.

Reported below, 47 Hun, 550.

(Argued December 4, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 18, 1888, which modified, and affirmed as modified, a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

John C. Ten Eyck for appellant. The directors elected by preferred stockholders under the reorganization plan have no power to issue mortgage bonds in excess of the amount authorized therein. (*Warren v. Ding*, 108 U. S. 389; *Lockhart v. Van Alstyne*, 31 Mich. 76; *St. John v. Erie*, 22 Wall. 136; *Jones on Railroads*, § 620.) The declaration of a dividend (other than a stock dividend) out of earnings which had been expended by the directors for betterments, is illegal; although such dividends may not exceed the amount of earnings that would have been applicable for that purpose if they had not been so expended. (*N. Y., L. E. & W. R. Co. v. Nichols*, 119 U. S. 296; *St. John v. Erie*, 22 Wall. 136-147; *Kent v. Q. M. Co.*, 78 N. Y. 159.) The issuing of bonds in payment of a dividend is of itself illegal. (2 R. S. 1531, §§ 3, 28; *N. T. Co. v. Miller*, 6 Stewart, 163; *R. R. Co. v. Howard*, 7 Wall. 409; *Bartlett v. Drew*, 57 N. Y. 587; *Upton v. Tubel-*

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129	631

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cock, 91 U. S. 47; 2 Black, 721; *N. Bank v. Douglas*, 1 McCreary, 86; *Richardson v. R. R. Co.*, 44 Vt. 622; *Evans v. Coventry*, DeG., M. & G. 835; *Wood v. Drummer*, 3 Mass. 308; *Merriman v. P. Co.*, 8 Pet. 286; *Cunan v. Arkansas*, 15 Hun, 304.) The words "capital stock" used in section 2, Revised Statutes, 1533, above quoted, have been decided by this court to refer to "property stock" as distinguished from "paper stock," and the object of the statute is to keep this property stock from being distributed among the stockholders; to keep it intact for the benefit of creditors and in order to ensure the carrying out by the company of the purposes for which its franchises were given to it. This object will be defeated if bonds secured by a mortgage on the "property stock" may be issued in payment of a dividend. (*Williams v. W. U. T. Co.*, 93 N. Y. 162.) In the absence of evidence of the value of the bonds which it is sought to have delivered up for cancellation, there is no basis for the granting of an additional allowance. (*Connaughty v. S. C. Bank*, 92 N. Y. 401; *O. & L. C. R. R. Co. v. V. & C. R. R. Co.*, 63 id. 176; *Weaver v. Ray*, 83 id. 89; *Coleman v. Chenny*, 7 Robt. 578; *Matthewson v. Thompson*, 9 How. Pr. 231; *Tilman v. Powell*, 13 id. 117; *Buchanan v. Morrell*, Id. 296.)

Robert W. deForest for respondents. The plaintiff's case rests entirely on the allegations and admissions of the answer, and upon these allegations and admissions taken as a whole. The plaintiff cannot rely on any admissions of the answer, except in connection with, and as modified by, the accompanying affirmative allegations. (*Goodyear v. De la Vergne*, 10 Hun, 537; *Vanderbilt v. Schreyer*, 21 id. 541; *Rouse v. Whited*, 25 N. Y. 170.) The power of directors of a corporation to borrow money for corporate purposes and to pledge the property of the corporation by mortgage, or otherwise, to secure debts so incurred without any vote of, or assent by, the holders of its common stock, is unquestionable in the absence of some statutory or other limitation. (*Wood on Railways*, 527, § 179.) The power of the directors to distribute net sur-

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plus earnings as dividends was not affected by the fact that these surplus earnings had been invested in new property, additions and betterments. Such an investment did not place this surplus beyond the reach of the dividend-making power of the directors. (*Williams v. W. U. T. Co.*, 93 N. Y. 162; *State of Maryland v. B. & O. R. R. Co.*, 6 Gill, 363; *Chaffee v. R. R. Co.*, 55 Vt. 110.) These dividends constituted a debt to the preferred stockholders under the terms of the reorganization agreement and the preferred stock certificate, and payment of the dividend in five per cent bonds simply operated as a discharge of this debt on terms more favorable to the company than cash payment. (*Nichols v. N. Y., L. E. & W. R. R. Co.*, 21 Blatchf. 177.) Whether these dividends constituted a debt or not, they were distinctly within the dividend powers of the directors, and not affected by the proviso that dividends should be non-cumulative. (*N. Y., L. E. & W. R. R. Co. v. Nichols*, 119 U. S. 306; *Boardman v. L. S. & M. S. R. R. Co.*, 84 N. Y. 174.) The courts will not interfere with the discretion of directors acting within the scope of their authority except to prevent manifest fraud or breach of trust. (*Clearwater v. Meredith*, 1 Wall. 25-40; *N. Y., L. E. & W. R. R. Co. v. Nichols*, 119 U. S. 304; *Beveridge v. N. Y. E. R. R. Co.*, 112 N. Y. 1.) The plaintiff must prove damage to warrant interference of a court of equity in the internal affairs of a corporation which lie peculiarly within the discretion of its directors. Not only is there no proof of damage in this case, but there is affirmative proof to the contrary. (*Brown v. M. R. Co.*, 13 Vav. 32.) The alleged wrongs of plaintiff are wrongs which the corporation should redress, and the plaintiff has no standing in court as an individual stockholder to redress these wrongs unless he has first requested the corporation to do so and they have failed to act. (*Haves v. Oakland*, 104 U. S. 450; *Dimpfel v. O. & M. R. R. Co.*, 110 id. 209.)

Marcus T. Hun for respondents. Directors of a corporation are not personally responsible for acts within their dis-

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cretion unless fraud be proved. In declaring the dividend in question the directors acted clearly within their discretion, and in accordance with the law as then established by decisions of the United States Circuit and the New York Supreme Courts. (*Hodges v. N. E. S. Co.*, 1 R. I. 312; *Sperry's Appeal*, 71 Penn. St. 24; *E. P. Co. v. Lacey*, 63 N. Y. 422; *Beveridge v. N. Y. E. R. R. Co.*, 112 id. 1.) The directors of a corporation have power to borrow money and mortgage the property of the corporation as security therefor, without the assent or approval of its stockholders unless prevented by statutory prohibition. This principle is well settled by practice and decision. (*Curtis v. Leavitt*, 15 N. Y. 9.) If net surplus earnings have been expended by the directors in betterments to the property, the directors are legally authorized to pay dividends in the shape of securities in lieu of cash to such stockholders as are entitled to the surplus earnings. (*Williams v. W. U. T. Co.*, 93 N. Y. 162.) Whether such a dividend should be declared or not rests in the discretion of the board of directors. (*N. Y., L. E. & W. R. R. Co. v. Nichols*, 119 U. S. 296.) The plaintiff has no standing to assert and prosecute the rights of the corporation. (*Barr v. N. Y., L. E. & W. R. R. Co.*, 96 N. Y. 444; *Detroit v. Dean*, 106 U. S. 537; *Dimpfel v. O. & M. R. R. Co.*, 110 id. 209; *Dodge v. Wheeler*, 18 How. Pr. 331; *Beveridge v. N. Y. E. R. R. Co.*, 112 N. Y. 1; Morawetz on Corp. § 243.)

PARKER, J. This was a suit in equity, and the relief demanded, among other things, was that a certain mortgage be declared to be void and of no effect; that it be delivered up to be canceled of record; and that the bonds sought to be secured thereby be likewise delivered up for cancellation. The answer admitted certain allegations of the complaint, specifically. Others, it admitted in a qualified manner, making, in connection therewith, other allegations of fact by way of explanation and justification, and denied others.

The cause coming on for trial before a court without a jury, the plaintiff presented such evidence as he deemed necessary

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and rested. Thereupon the defendant made a motion to dismiss the complaint. Decision was reserved. About two months later, the court granted the motion to dismiss and a judgment was subsequently entered dismissing the complaint upon the merits of the case.

The appeal to this court from the judgment of affirmance thereof must be dismissed, because the trial court failed to comply with the following provisions of section 1022 of the Code of Civil Procedure: "The decision of the court, or the report of the referee, upon the trial of the whole issue of fact, must state separately the facts found, and the conclusions of law." When a complaint is dismissed before the introduction of testimony it is a determination that the complaint does not state facts sufficient to constitute a cause of action, and in such case a situation is presented which does not come within the purview of that section. Neither does a case where judgment is rendered on the pleadings. (*Eaton v. Wells*, 82 N. Y. 576.) But in any and every case triable before a court without a jury or heard by a referee, if any evidence be presented, a decision stating separately the facts found and the conclusions of law based thereon must be made. If it be not done, the judgment cannot be reviewed. (*Bridger v. Weeks*, 30 N. Y. 328.)

The Code afforded to the plaintiff ample opportunity for protection against the omission of the court. (§ 1010.) But he did not avail himself of it. He did not even submit in writing a statement of facts which he deemed established and desired the court to find as provided by section 1023.

A difference of opinion has heretofore existed in several of the departments as to the conditions which bring a case within the command of section 1022. (*People ex rel. Colton v. Ranson*, 2 N. Y. S. R. 78; *Benjamin v. Allen*, 7 Civil Pro. R. 202; *Rousseau v. Bleau*, 29 N. Y. S. R. 334; *Grange v. Palmer*, 31 id. 612; *Bishop v. Empire Tran. Co.*, 5 J. & S. 12.)

An examination of the questions to which the counsel for the appellant called our attention on the argument led to the

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conclusion that no error was committed at General Term, but as we have concluded that the appeal ought to be dismissed, the occasion does not call for an expression of the reasons inducing such conclusion.

The appeal should be dismissed.

All concur, except BRADLEY, J., not voting.

Appeal dismissed.

THE UNION CEMETERY ASSOCIATION et al., Respondents, v.
DAVID W. McCONNELL et al., Appellants.

In an action brought by property owners in the city of Buffalo to determine the legality of certain assessments upon their premises to pay the expense of macadamizing a street, to enjoin the city from enforcing the collection thereof, and to restrain payment of any money to the defendant McC., who was the contractor for the work, out of the fund created by the assessment, it appeared that the contract with McC. provided that payments should be made to him semi-monthly, as the work progressed, at the discretion of the common council, upon estimates of the engineer of the amount of work actually performed. The only finding as to any wrong doing by any city officer was that the city engineer, knowing that McC. had not performed the work in accordance with the specifications, had recommended the common council to pay McC. out of said fund. There was no finding that said recommendation had been adopted, or that the common council were about to adopt it, or had fraudulently or wrongfully directed payments to McC., or that the other city officials, without whose acts, under the city charter (§ 30, tit. 2, chap. 519, Laws of 1870), money could not be drawn from the treasury, were threatening to do any wrong or improper act, or that McC. held any orders or warrants that have not been paid. A judgment was rendered, declaring the assessments void, restraining their collection, and enjoined the city and its officers from drawing any order or warrant, or directing any to be drawn, on said fund to McC. or his order until the work was completed as required. The General Term reversed the judgment as to the assessments, but affirmed the residue thereof. *Held*, it must be assumed that the assessments and the contract with McC. were valid; that in the absence of a finding that the duty imposed upon the common council by the charter as to McC.'s contract was not properly and rightfully performed, the court could not interfere, and, therefore, that the affirmance was error.

(Argued December 4, 1890; decided January 14, 1891.)

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APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 22, 1886, which affirmed in part and reversed in part a judgment in favor of plaintiffs entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Giles E. Stilwell for appellant McConnell.

Frank C. Laughlin and *W. F. Worthington* for the City of Buffalo, appellants. The exception taken to the conclusion of law, that the plaintiffs were entitled to judgment against the city, is valid. (Laws of 1881, chap. 531.)

Frank R. Perkins for respondent. This action is clearly within the equitable jurisdiction of the court. (*Overton v. Olean*, 37 Hun, 47; *Harvey v. McDonell*, 48 id. 409; *Clark v. Dunkirk*, 12 id. 184; *Strusburg v. New York*, 87 N. Y. 454; *N. Y. I. Asylum v. Bd. Suprs.*, 31 Hun, 116; *In re N. Y. C. Protectory*, 77 N. Y. 342; *Bank of Chemung v. Elmira*, 53 id. 49; *Lathrop v. City of Buffalo*, 3 Abb. Ct. App. Dec. 33; *Boyle v. City of Buffalo*, 71 N. Y. 5; *In re Raymond*, 21 Hun, 229; *In re Righter*, 16 Wkly. Dig. 567; *People v. City of Rochester*, 54 N. Y. 511; *Hassen v. City of Rochester*, 65 id. 516; 67 id. 529; *Taylor v. Palmer*, 31 Cal. 254; *In re Market St.*, 49 id. 546; *Thomes v. Gain*, 35 Mich. 162; *Kellogg v. City of Elizabeth*, 40 N. J. 274; *Morris v. Jersey City*, 40 id. 486; Dillon on Mun. Corp. §§ 451, 809, 810, 811, 921, 922, 923, 924; *Henderson v. Lambert*, 14 Bush. [Ky.] 24; *McCafferty v. Mayor, etc.*, 13 How. Pr. 276; *Bond v. Newark*, 19 N. J. Eq. 376; *Liebstein v. Newark*, 24 id. 200, 238; *U. T. Co. v. Weber*, 96 Ill. 346; *Stone v. Veile*, 38 Ohio, 314; *People v. Van Vort*, 65 Barb. 331; *Smith v. City of Buffalo*, 1 Sheld. 494; *Green v. Mayor, etc.*, 3 T. & C. 753; *Dickerson v. Poughkeepsie*, 7 Hun, 1; 75 N. Y. 65; *Hersee v. Buffalo*, 1 Sheld. 446.)

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This action may also be upheld under chapter 531 of the Laws of 1881. (1 R. S. [7th ed.] 865; *Tappan v. Crissey*, 64 How. Pr. 496; *Latham v. Richards*, 15 Hun, 129.) The facts found by the referee are not excepted to, but are the conceded facts in the case; upon these facts the judgment is authorized and should be sustained. (*B. C. Cemetery v. City of Buffalo*, 46 N. Y. 506.)

BROWN, J. This action was brought by the Union Cemetery Association of Buffalo and six other plaintiffs to determine the legality of certain assessments upon the plaintiffs' premises levied to pay the expenses of macadamizing Delaware street in the city of Buffalo, and to enjoin the said city from enforcing the collection thereof, and to restrain payment of any money to the defendant McConnell, who was the contractor for doing said work.

The judgment entered upon the report of the referee before whom the action was tried declared said assessments void, restrained their collection, and enjoined the city and its officers from drawing any order or warrant, or from directing any order or warrant to be drawn upon the fund created by said assessments to the defendant McConnell or any other person on account of the work done on said Delaware street, until said work should be done and completed as required by the specifications and until the further order of the court.

Upon appeal to the General Term that court reversed that part of the judgment which declared the assessments void, and restrained their collection, and adjudged "that the judgment appealed from in so far as it restrains, enjoins and prevents the city of Buffalo, its officers and agents, and particularly the defendant, the treasurer of the city of Buffalo, and each and every of them, from paying out or expending any money from the fund created or to be created by the collection of the assessments contained in the assessment-roll mentioned and referred to in the pleadings of any part of said assessments upon the warrants heretofore drawn upon said fund, etc., etc., is affirmed."

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From the last quoted part of the judgment the city of Buffalo and the defendant McConnell have appealed to this court.

We are of the opinion that the judgment appealed from cannot be sustained.

Without expressing any opinion whether an action might be maintained under chapter 531 of the Laws of 1881, to restrain payments to the contractor upon the facts alleged in the complaint, it is sufficient to say that the action was not brought under that statute, and by reason of obvious defects cannot now be supported by it, and that the findings of the referee do not sustain the General Term judgment.

There is no finding that McConnell holds or has ever had any orders or warrants that have not been paid. The only finding on that subject is, "that there has been collected on said roll the sum of \$983.93, and there has been paid out on orders drawn thereon \$619."

But treating the General Term judgment as an affirmation of the Special Term, and intended to restrain generally payments from the fund until the work was completed, the judgment must be reversed.

By the provisions of the charter, title 2, section 30, chapter 519, Laws of 1870, money can be drawn from the treasury only on warrants authorized by the common council, signed by the mayor or city clerk, and countersigned by the comptroller, specifying the purpose for which they are drawn, and the fund out of which they are payable. The contract with McConnell provided that payments should be made to him semi-monthly as the work progresses, at the discretion of the common council, upon an estimate of the engineer of the amount of work actually performed. The only finding as to any wrong doing by any city officer is that the city engineer, knowing that said contractor had not performed the work in accordance with the specifications, had recommended to the common council payment to said contractor out of the fund.

There is no finding that the common council had adopted said recommendation, or were about to do so, or had fraudu-

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lently or wrongfully directed payments to said contractor, or that the mayor, city clerk or comptroller, without whose acts money could not be drawn from the treasury, had or were threatening to do any wrong or improper act.

The case seems barren, therefore, of any fact that would justify the court in restraining the city and its officers from performing its duty toward the contract in question which the charter had plainly devolved upon them.

The record does not contain any opinion of the General Term, and we are not informed of the reasons for the judgment of that learned court.

As the case came to us we must assume that the assessment and the contract with McConnell are valid.

The plaintiffs' contention is, that as the work was not done in accordance with the specifications, and has not materially benefited or improved their property, the contractor should not be paid. Their claim is certainly reasonable and equitable, and the contractor should not be paid until he has performed his contract.

But the charter has devolved upon the common council the duty of auditing the contractor's bills, and determining when and in what sums he should be paid, and in the absence of any finding by the referee that that duty was not being properly and rightfully performed the court cannot interfere.

We are of the opinion that the complaint states but one cause of action, and that, assuming as we must that the assessments were legal, the judgment appealed from cannot be sustained in the facts found by the referee. It must, therefore, be reversed, and the complaint dismissed, with costs to the appellants in all courts.

All concur, except BRADLEY and HAIGHT, J.J., not sitting.
Judgment reversed.

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ELIZABETH A. L. HYATT, Respondent and Appellant, v.
JOSHUA K. INGALLS et al., Respondents and Appellants.

Where, by an agreement between the parties, a patentee grants to a licensee the right to make and sell his inventions, and the licensee acknowledges the validity of the patent and stipulates to pay royalties, an action to recover the royalties does not arise under any act of congress in relation to patents, and is within the jurisdiction of the state courts.

In such an action, where part of the relief demanded is a rescission of the agreement because of defendant's breach of the contract, and that relief is granted, plaintiff is entitled to an accounting and payment of royalties up to the time of the entry of judgment, but relief by injunction against future acts on the part of defendant will not be granted.

A patent for an improvement in illuminated basements and basement extensions, sidewalks, roofs, etc., was issued to plaintiff in 1867, and reissued in 1878. By an agreement made in November, 1878, plaintiff granted to defendants the exclusive right to manufacture and sell within certain territorial limits the illuminated tile work covered by the patent and its reissue. It was provided that the license should last during the continuance of the patent, or any extension or renewal thereof. The licensees recognized the validity of the patent, and expressly consented that it might be reissued by plaintiff as often as she should choose to do so. Defendants agreed to pay a specified royalty for tiles or plates used for the purposes specified in the patent. They manufactured and sold the patented articles, and up to August 1, 1881, paid royalties thereon. In September, 1881, plaintiff obtained a reissue of the patent, and thereafter defendants refused to pay royalties, although they continued to manufacture and sell. Plaintiff thereupon notified them that the license was forfeited. In an action to procure a cancellation of the agreement, an accounting and payment of royalties, and an injunction restraining defendants from selling or using the articles embraced in the patent, defendants set up as a defense that the reissued letters patent were void because they embraced other clauses than those covered by the previous letters, and omitted specifications and claims which were in the latter, and that the state court had no jurisdiction. *Held*, that the action did not arise under any law of congress relating to patents, and was within the state jurisdiction.

Also *held*, that defendants having acknowledged the validity of the patent and consented to a reissue thereof, were estopped from questioning it.

Also *held*, that while the reissued letters were apparently broader than the former ones, yet as they substantially embraced the claims represented

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133	504

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135	312

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by the latter, they were invalid only as to the excess, and so defendants were not prejudiced by the reissue; and that as it was a matter simply of comparative construction of the different letters, it could be passed upon by the state court.

Also *held*, that the service of the notice of forfeiture given by plaintiff and the claim of forfeiture in the complaint did not destroy the effect of the contract as an estoppel, as defendants continued thereafter to use and sell the patented articles in the manner authorized by the license; and that they could not assert as a defense that in doing so they did not proceed under it.

It appeared that in January, 1882, plaintiff brought an action against defendants to recover royalties for the quarter ending November 1, 1881, and such action was pending at the time of the commencement of this action. The recovery in this action included the royalties for that quarter. It appeared, however, that several years before the referee's report was made, upon which final judgment in this action was entered, the former action was discontinued by the consent of defendants' attorneys. *Held*, that the defense of a former action pending was not available.

The referee refused to find that defendants were liable to account for illuminating tiles when they had inserted glasses in iron which were adapted or could be used for illuminating roofs of areas or basement extensions, and had not shown they were so used; he also refused to find that they were liable to account for all such tiles adapted to such use, manufactured and sold by them to others to be used, as the defendants had not shown were so used. *Held*, no error; that while it was defendants' duty to account for all sales of tiles which were used for the licensed purposes, they were not chargeable under the contract for tiles sold which were not so used, or because they did not know to what use they were in fact applied; and that the burden was upon plaintiff to show that tiles sold by defendants were used for the purposes specified, to entitle her to royalties thereon.

(Argued December 8, 1890; decided January 14, 1891.)

CROSS-APPEALS from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 7, 1888, which affirmed a judgment in favor of plaintiff entered upon the report of a referee appointed in pursuance of an interlocutory judgment herein, which interlocutory judgment was modified and affirmed as modified by an order of the General Term, made December 3, 1883, which order was also brought up for review.

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The action was founded upon alleged rights secured to the plaintiff by letters patent of the United States of date August 27, 1867, and reissued August 6, 1878, for the improvement in illuminated basements and basement extension sidewalks, roofs, etc., and upon agreements between her and the defendants, and the relief sought was that the defendants account to her for royalties under the alleged agreement and license; that such agreement and license be declared forfeited, and that the defendants be enjoined from manufacturing, selling or using the articles embraced in such letters patent.

On November 21, 1878, the plaintiff, with Thadeus Hyatt and Theodore Hyatt, entered into an agreement with the defendants and other firms reciting that letters patent were granted to the plaintiff on the application of Thadeus Hyatt, August 27, 1867, and reissued August 6, 1878, and whereby they agreed to license the defendants and such other firms under such letters patent to manufacture or sell to be used in the territory there mentioned, the illuminating tile work covered by such letters, and to license no other party without their consent in such territory. And the plaintiff agreed not to engage in manufacturing tiling for or laying any basement extension, nor tiling of any kind covered by such letters patent, and Thadeus and Theodore Hyatt joined with her in such agreement with certain qualifications. The defendants and such other firms agreed to pay the plaintiff thirty cents per square foot of the illuminated tiles or plates used, of which they were to render accounts quarterly on first of February, May, August and November to the plaintiff. This instrument contained other provisions which it is now unnecessary to mention. On the same day the plaintiff entered into a further agreement with the defendants reciting as in the other, and further that the plaintiff had by the other agreement agreed to give and the defendants to take a license under such patent to make illuminated basements and basement extensions and to manufacture illuminating materials of the same. Then followed these provisions:

“Art. 1. The said Joshua K. Ingalls and Jacob Mark hereby

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acknowledge the validity of the said letters patent to the said Elizabeth Adelaide Lake Hyatt.

"Art. 2. The said Joshua K. Ingalls and Jacob Mark consent that the said E. A. Lake Hyatt may without prejudice to this agreement hereafter reissue when and as often as she shall choose, the said patent of August 27, 1867, as reissued 6th August, 1878."

Then it proceeded that the plaintiff on the terms and conditions therein mentioned licensed the defendants to manufacture and sell at any place within such territory; that the license should not be transferred without her consent, etc.; that the defendants should at the end of each quarter render an account in writing under oath to the plaintiff and make payments for all illuminating work sold and sent away from their premises to be used for the purpose of making illuminating basements and basement extensions; that if either party should knowingly and intentionally violate the agreement such party should forfeit all rights under it; and that the agreement should be valid and binding during the continuance of the letters patent and any extension of them. The parties proceeded under these contracts and license, and the defendants paid the royalties until in 1879, when a controversy arose between them in which were involved the other parties to the first mentioned agreement, and suits were commenced. Afterwards on November 24, 1880, the matters were compromised, and a further contract entered into between all the parties reciting the fact that controversies had arisen whereupon they made the supplemental agreement to the effect, that the agreement first above mentioned, was ratified and reaffirmed except so far as it was inconsistent with the provisions of this one; that such suits should be discontinued; that the plaintiff discharged the defendant's firm of Mark & Ingalls and all the other firms and each of them from the payment of all royalties under their several licenses of November 21, 1878, for the period of six months; that nothing in the agreement or licenses shall bind them to the payment of royalties for roofs or roof lights, other than basement extension roofs, until such other

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roofs or roof-lights shall have been judicially determined to be covered by the patent. The defendants rendered their accounts to the plaintiff up to and not later than November 12, 1881, and paid her royalties to and not after August 1, 1881. In January, 1882, the plaintiff caused to be served upon the defendants a notice as follows:

"Messrs. INGALLS & MARK:

"GENTLEMEN—In view of your failure to make return in writing and payments of royalties to me as required by the license granted by me to you November 21, 1878, under my patent for improvement in illuminated basements, basement extensions, etc., and your expressed determination not to make any further such returns or payments I herewith notify you that I deem the said license forfeited by you and as no longer existing.

Yours, etc.,

"E. A. L. HYATT,

"By Wm. F. Scott, her Atty.

"Dated New York, *January 14*, 1882."

This action was commenced in October following. And the trial court directed judgment forfeiting the defendants' license and forever restraining them from manufacturing, etc., illuminating roofs, roof pavements, basements, basement extensions, etc.; also that the plaintiff have an accounting and a reference for that purpose; and that she recover the amount found due her for royalties, with interest and costs, and interlocutory judgment was entered accordingly. On appeal from that judgment the General Term so modified it as to strike out the injunctive relief granted, and as to limit the time of accounting to that between November 1, 1881, and the time of entry of the interlocutory decree, and as so modified it was affirmed. Then followed an extended hearing before the referee, his report, final judgment, and its affirmance.

Further facts are stated in the opinion.

George W. Van Slyck for plaintiff. The questions involved upon the appeal herein from the interlocutory judgment were

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passed upon in plaintiff's favor by this court in the case of this plaintiff against the Dale Tile Manufacturing Company. (125 U. S. 46; 106 N. Y. 651.) The service of the notice by the plaintiff on January 12, 1882, declaring the license forfeited, is no bar to this suit. (*U. Mfg. Co. v. Lounsbury*, 41 N. Y. 363; *Hartell v. Tilghman*, 99 U. S. 547; *Adams v. Meyrose*, 2 McCreary, 360.) The plea of a former action pending, as a bar up to November 1, 1881, is not sustained by the complaint put in evidence. (*Stowell v. Chamberlain*, 60 N. Y. 272; *Kelsey v. Ward*, 16 Abb. Pr. 98-103; 38 N. Y. 83; 1 Barb. Ch. 125; 1 Daniels' Ch. 632; Story on Eq. Pl. § 736; *White v. Smith*, 7 Hill, 520; *Averill v. Patterson*, 10 N. Y. 500; 3 How. Pr. 414; 15 N. Y. S. R. 794.) By the acceptance of a license and agreement to pay royalty for the use of a patented device, the defendants are precluded from showing the invalidity of the patent in an action for the recovery of royalty. (*Marston v. Swett*, 66 N. Y. 206; 82 id. 530; *Hyatt v. D. T. M. Co.*, 8 N. Y. S. R. 631; *Skinner v. W. A. W. M. & R. Co.*, 14 id. 317; *P. M. Co. v. Owsley*, 27 Fed. Rep. 108; *Starling v. S. P. P. Works*, 32 id. 290.) The defendants are liable to account for all tiles adapted for covering basement extension, and manufactured and sold by them, or manufactured and used by them, which they have not shown were actually used for purposes other than basement extension, or how much material was to be used. (*R. Co. v. Goodyear*, 9 Wall. 864; Walker on Patents, § 719; *Root v. R. Co.*, 105 U. S. 214; *Miller v. Whilton*, 36 Me. 585; *Lupton v. White*, 15 Vesey, 440; *Dexter v. Arnold*, 2 Sum. 108; *Copeland v. Crane*, 9 Pick. 73, 79.) The defendants are liable upon the same principle as contributory infringers are in infringement cases. This principle of contributory infringement is of great antiquity and universally supported. (*Wallace v. Holmes*, 9 Blatchf. 65; *Richardson v. Noyes*, 10 Pat. O. Gazette, 507; *Bowker v. Dows*, 2 B. & A. 518; *A. Co. v. Payne*, 27 Fed. Rep. 559; *Travers v. Beyer*, 26 id. 450; *C. Co. v. Simms*, 106 U. S. 89; 1 Black, 427; 1 Wall. 78.) The subsequent acts of the parties with reference to the construction of their

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contract obligations are controlling upon them. (*City of Chicago v. Sheldon*, 9 Wall. 40; *Nickerson v. A. T. & S. F. R. R. Co.*, 17 Fed. Rep. 408; 3 McCrary, 455; *Boody v. R. & B. R. R. Co.*, 3 Blatchf. 25; 24 Vt. 666; *Reading v. Gray*, 5 J. & S. 79; *Stokes v. Recknagel*, 6 id. 368; *Beachem v. Eckford*, 2 Sandf. Ch. 116; *H. & N. H. R. R. Co. v. N. Y., N. H. & H. R. R. Co.*, 3 Robt. 411; *Gray v. Gannon*, 4 Hun, 57; *Kester v. Reynolds*, 6 id. 626.)

Edward D. McCarthy for defendants. This is an infringement suit in its whole scope and meaning. An infringement of a patent is the manufacture, use, or sale of the protected invention by any person not duly authorized to do so. These are the very acts which the plaintiff alleges that the defendants have committed. If, therefore, the reissued patent of 1881 was valid, the defendants, by their refusal to recognize it and to pay fees, became infringers and liable to be perpetually enjoined. Over such an action, the Federal Courts have exclusive jurisdiction. (*Kayser v. Arnold*, 41 Hun, 275; *C. S. S. Co. v. Clark*, 100 N. Y. 365; *Kelly v. K. S. Mfg. Co.*, 15 Bradw. 547; *Smith v. S. L. M. Co.*, 22 O. G. 587; 20 Blatchf. 360; 19 Fed. Rep. 825; *Campbell v. James*, 18 O. G. 1111; 2 Fed. Rep. 338; 18 Blatchf. 92; 5 B. & A. 354; *Satterthwaite v. Marshall*, 4 Del. Ch. 337; *Meserole v. U. P. C. Co.*, 3 Fish, 483; 6 Blatchf. 356; *Bloomer v. Gilpin*, 4 Fish, 50; *B. G. Co. v. B. & S. Co.*, 36 Fed. Rep. 309; 29 id. 295; 32 id. 627; *S. C. Co. v. Sheldon*, 5 Fish, 477; 10 Blatchf. 1; *C. P. Co. v. Wolf*, 28 Fed. Rep. 814; 37 O. G. 567; *Bell v. McCullough*, 1 Fish, 380; 1 Bond, 194; *H. S. Mfg. Co. v. Porter*, 34 Fed. Rep. 745; *Cohn v. N. R. Co.*, 3 B. & A. 568; 15 O. G. 829; *Moody v. Faber*, 5 O. G. 273; Holmes, 325; 1 B. & A. 41; *Starling v. S. P. P. Works*, 41 O. G. 818; 32 Fed. Rep. 290; 127 U. S. 376; 43 O. G. 1350; *Covell v. Bostwick*, 39 Fed. Rep. 421; *Brooks v. Stolley*, 3 McLean, 525; *Woodworth v. Weed*, 1 Blatchf. 165; *Goodyear v. I. R. Co.*, 4 id. 66; *Wilson v. Sherman*, 1 id. 536.) Plaintiff was bound to sue

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either for an injunction and account or for fees, as the defendants cannot be treated both as infringers and licensees. (*Miller v. Tuska*, 87 N. Y. 169; 49 id. 168; *Shelley v. Brannan*, 4 Fish, 198; 2 Biss. 315; *Goodyear v. Hills*, 3 Fish, 134; *Porter v. Muller*, 2 id. 463; *Goodyear v. Day*, 2 Wall. 283; 24 Blatchf. 269; 38 Fed. Rep. 747; 3 B. & A. 578; *Miller v. B. Co.*, 104 U. S. 350.) If the bill had not contained the demand for an injunction, but only for an account of profits and royalties, the local court would still have been powerless. The demand for an account of profits and royalties, of itself, presupposes an infringement and right of injunction. (*Root v. R. R. Co.*, 105 U. S. 194; *Colburn v. Simms*, 2 Hare, 554; *Parrott v. Palmer*, 3 M. & K. 632; *Smith v. L. & S. W. R. R. Co.*, Kay, 408; *Baily v. Taylor*, 1 R. & M. 73; *Crossley v. Beverly*, Web. P. C. 119; Daniel's Ch. Pr. 1797; *Stevens v. Hadding*, 17 How. Pr. 455.) No Court of Equity, whether State or Federal, will entertain an action of accounting between a licensor and his licensee. (*Root v. R. Co.*, 105 U. S. 207; *Marvin v. Brooks*, 94 N. Y. 80; *E. Co. v. B. Co.*, 11 Wall. 488.) If the equity could intervene to adjudge this worthless paper to be canceled, which both parties had abrogated, which was not assignable, and which contained no element of a trust, then it could entertain jurisdiction of any contract whatsoever, which was evidenced by a written paper. (*Field v. Holbrook*, 6 Duer, 597; 75 N. Y. 397.) The answer alleges that the last reissue was invalid. The question thus presented is a federal question, and a state tribunal cannot entertain it. (103 U. S. 603.) Not one act or word of the defendants exists on which estoppel can be predicated. (*Woodworth v. Cook*, 2 Blatchf. 160; *Burr v. Duryee*, 2 Fish, 283.) It was error to allow the plaintiff \$632, a sum alleged to be due on account stated up to November 1, 1881. (*Gresham v. Lyon*, 16 Barb. 465; *Dawley v. Brown*, 9 Hun, 461; *McCloskey v. Hammil*, 15 Fed. Rep. 750.) The original patent of 1867, the reissue of 1878, and the reissue of 1881, are now before the court, and if the question were *res nova* still, an inspection and comparison of the papers, with their specifications and claims, show

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that the reissue is absolutely void. (*Russell v. Dodge*, 93 U. S. 460; *Powder Co. v. Powder Works*, 98 id. 126; *W. & M. Co. v. Wilson*, 16 J. & S. 160; *Driven Wells Cases*, 16 Fed. Rep. 387-394, 399; *B. W. P., W. & M. Co. v. Fuchs*, Id. 667; *Gould v. Spicer*, 15 id. 344; *S. M. Co. v. Goodrich*, Id. 455; *Moffett v. Rogers*, 106 U. S. 423; *Turner v. Dover Co.*, 111 id. 319; *White v. Dunbar*, 119 id. 47; *Miller v. Brass Co.*, 104 id. 350, 352, 355; *Mahn v. Harwood*, 112 id. 354; 21 Blatchf. 66, 67; *R. R. Co. v. Mellon*, 104 id. 118; *Wing v. Anthony*, 106 id. 145; *Gosling v. Roberts*, Id. 39; *L. Co. v. Higgins*, 105 id. 580; *Bautz v. Frantz*, Id. 160-164; *Matthews v. M. Co.*, Id. 54-57.) The plain language of the contract shows that the referee erred in charging defendants for roof coverings over area-ways. (*Miller v. B. Co.*, 104 U. S. 352; 106 id. 145.) The contention that this tile is a necessary part of an illuminating roof, and that an illuminating roof covers an extended basement, and that an extended basement is the thing invented; *ergo*, that every tile which we sold must be accounted for now because it might be used to light an extended basement, is erroneous. (16 Pet. 336-341; 1 Black, 427; 1 Wall. 78, 79; 1 Curtis, 260-279.)

BRADLEY, J. The defendants' appeal goes to the foundation of the action. The plaintiff's appeal has relation only to the subject of the direction given for the accounting of the defendants. The plaintiff, by her complaint, referred to and set forth the granting to her of the letters patent of 1867, the reissuing of them in 1878 and in September, 1881, the agreements with the defendants and the license to them to make illuminating basements and basement extensions under such patent, and alleged that they did sell such work and render accounts quarterly up to November 1, 1881; that they had not paid royalties for the quarter ending on that day; that since then they had refused to render any account; and that they had repudiated their agreement and asserted their right to manufacture and sell such illuminating work without the license and consent of the plaintiff; and she further alleged that the

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defendants intentionally violated their agreement, and by virtue of the terms and conditions of it and the license, and by reason of such refusal, the rights and privileges of the defendants under those instruments have ceased and become wholly forfeited; that by the continuance of the manufacture and sale by them of the patented articles, and the use and operation by them of the license, the plaintiff was at the time of the commencement of the action suffering irreparable injury and damage; and that the plaintiff has kept and performed such agreements and license on her part. The defendants, amongst various matters of defense, alleged that the letters patent reissued in September, 1881, were void, because they embraced more and other claims than were included in the reissue of 1878, and omitted specifications and claims which were in the latter.

It is contended by the defendants' counsel that this suit was for alleged infringement of letters patent, and that the state court had no jurisdiction of the subject-matter; and the defendants alleged that the issue made by the portion of the answer before mentioned denied to such court jurisdiction to try it. If this were an action for infringement of letters patent, presenting a controversy arising under the patent laws of the United States, it would be a case exclusively in the jurisdiction of the Federal Court. But while the allegations of the complaint contain elements of an action for infringement of the plaintiff's patent, it may be observed that it is founded upon a contract between the parties, and the forfeiture sought is for a breach of such contract by the defendants. In that view the controversy does not arise under any act of congress in relation to patents, and is within the state jurisdiction. (*Hartell v. Tilghman*, 99 U. S. 547; *Dale Tile Mfg. Co. v. Hyatt*, 125 id. 46; *Continental Store Service Co. v. Clark*, 100 N. Y. 365.) It is urged, however, that the issue as to the validity of the letters patent alleged to have been reissued in 1881, is one not within the jurisdiction of the state court; and, at all events, that the plaintiff was not entitled to recover upon the evidence bearing upon that issue. The original letters were those of

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1867, and the practical purpose of a reissue is to make the description of the invention more clear, plain and specific, and to rectify any mistakes inadvertently made in the original (*Russell v. Dodge*, 93 U. S. 460), but the claim of the patentee in them cannot be effectually enlarged, and so far as it is made substantially to represent a new claim, or one greater than that included in the original patent, the reissue is void. (*Miller v. Brass Co.*, 104 U. S. 350; *White v. Dunbar*, 119 id. 47.) And if the reissue fail to include the entire claim embraced within the original letters, the portion omitted may be deemed dedicated to the public and lost to the patentee. (*Turner v. Dover S. Co.*, 111 U. S. 319.) In view of these general principles applicable to patents and to the surrender and reissue of letters, it is argued that by the surrender of those of 1878, existing when the license was made, the right to protection under them was not only lost to the defendants, and all rights founded upon them denied to the plaintiffs, but that those reissued in 1881 were not effectual to support either, because they were broader in their claims, description and specifications, and, therefore, invalid. Whether substantially so or not, it is true that the letters reissued in 1881 were apparently broader and more comprehensive in those respects than were the letters of 1878. But the former embrace the claims represented by the latter substantially and with sufficient distinctness to preserve them within the principle that the reissue of letters patent embracing more than did those surrendered, will be deemed invalid as to the excess, or new claim only, embraced in the latter; and, therefore, the defendants were not prejudiced by such reissue. (*Gage v. Herring*, 107 U. S. 640.) This is matter of comparative construction of the two reissues. Beyond that it may be that the determination of the question of the validity of the reissue of 1881 is exclusively within the jurisdiction of the Federal Court. But the present case is relieved from the embarrassment of that question by the contract between the parties, by which the defendants expressly acknowledged the validity of the letters patent as they existed when the contract and lease were made, and stipu-

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lated that the plaintiff might, without prejudice to such agreement, thereafter when and as often as she should choose, reissue such patent of 1867 as reissued in 1878.

It is, however, urged that the agreement and license are not effectual to estop the defendants in that respect, because the plaintiff, by her notice to them to that effect, as was her right to do, had declared their license forfeited and as no longer existing, and not only that, but by allegation in her complaint she charged that the rights and privileges of the defendants under the license were forfeited. This notice may have enabled the defendants to surrender up the license and terminate their relation as licensees. This they did not offer to do, or give the plaintiff any notice to that effect, but continued to use and sell the patented articles in the manner authorized by the license. They are not, therefore, permitted to effectually assert, as a defense, that they did not proceed under it in doing so. (*Union Mfg. Co. v. Lounsbury*, 41 N. Y. 363.) The forfeiture alleged in the complaint and sought for by the action, was a right in recognition of and arising upon the contract and founded upon its breach; and although such was expressly given by the contract, it did not necessarily depend upon its terms in that respect, but was properly derivable from a substantial violation of its provisions by the defendants. There was, therefore, nothing essentially of the subject-matter or purpose of the action, which barred the controversy from the State Court or brought it within Federal jurisdiction. (*Hartwell v. Tilgham*, 99 U. S. 547.) And the defendants having entered into the contract with the plaintiff and taken from her a license to use and sell the subject of the patent, cannot for the purposes of their defense to an action to recover the royalties, question the validity of her patent. (*Marston v. Swett*, 66 N. Y. 206; 82 id. 527; *Hyatt v. Dale Tile Mfg. Co.*, 8 N. Y. S. R. 631; 106 N. Y. 651; 125 U. S. 46.)

As contended by defendants' counsel an action for an accounting for the royalties is not one of equitable cognizance as it involves no trust, but is simply an action to recover the amount due from a debtor to a creditor upon a contract for the pay-

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ment of money. This claim of the plaintiff was not merely incidental to or dependent upon the equitable relief asked for in her complaint, although properly united with it. No objection was taken by answer or otherwise to the determination of that portion of the cause of action and the relief, founded upon the theory that the injunctive relief demanded was not available. Nor so far as appears was any such question raised in that respect to the accounting, although the General Term had modified the interlocutory judgment by striking out such injunctive relief given by it. No such question, therefore, is here for consideration. (*Town of Mentz v. Cook*, 108 N. Y. 504.) There was, however, another demand for equitable relief to the effect that the license to the defendant be rescinded, and the provision of the decree so determining and directing remains effectual. This certainly rendered the injunctive part of it unnecessary or improper, because on the judicial rescission of the license, the defendants could not further proceed under it, and the court had no power to restrain the defendants from acts of mere infringement of the plaintiff's patent. There is no occasion to consider further the questions raised on this review in respect to the form of the action.

The main exceptions taken by the defendants to the accounting as directed by the referee, confirmed by the final judgment and affirmed by the General Term, had relation to what was the illuminating work referred to in the license. This was somewhat a matter of interpretation of the "phrase basements and basement extensions" as used in that instrument. While the plaintiff claimed that it included the illuminating covers of areas as well as basements extended beyond and under sidewalks, the defendants insisted that it did not include areas. The referee's finding supported the plaintiff's claim in that respect. The method of making such extension effectual was to take down the front wall of the area and put in its stead an iron girder supported by the lateral walls or by columns or both and over the extension as well as over that which before was the area putting the illuminating tile, made of iron and glass, thus furnishing sidewalk, treads, platform, and risers

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made of iron and glass, having suitable strength and durability for such purposes, and supplying light to the basement and its extension. The import of the provision of the license descriptive of the work, its application and extent in that respect, is not defined with entire clearness by the words used, and whether or not the basement extensions embraced areas was a question of fact upon which the finding of the referee was not without evidence for its support. And as bearing upon the intent of the parties, and in aid of such construction of the instrument in that respect, it appeared that in accounts which the defendants had voluntarily rendered and paid to the plaintiff pursuant to the license, were included royalties for illuminating work over areas. The determination of that question of fact in the court below must be deemed conclusive. And the question (subordinate to that just mentioned) whether a public use of such covering of areas by the inventor before his application was made for a patent, had not defeated the right to take an effectual one for it as applied to them, may also have been a question of fact. The conclusion was warranted that such use was in good faith for experimental purposes, and, therefore, not prejudicial to the patentee. (*Elizabeth v. Pavement Co.*, 97 U. S. 126.) The method of making and allowing to be made, objections to the defendants' account and of surcharging by the plaintiff and the manner of treating them by the referee, was a matter of practice not subject to the review of this court inasmuch as there was evidence to support the allowance of the account as made and determined by him.

The only further question upon the defendants' appeal requiring consideration arises upon their defense alleged of a former action pending at the time this one was commenced. It appears that in January, 1882, an action was brought by the plaintiff against the defendants in the Court of Common Pleas of the city of New York, to recover the royalties due for the quarter ending November 1, 1881, and that such action was pending at the time the interlocutory decree was entered. It will be observed that such action did not and could not embrace within its purpose the entire claim for royalties for

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which this action was brought, and for which recovery was had. The recovery in this action included them up to April, 1883. The allegation of the pendency of the former action at law could not, therefore, be treated as a complete defense. And it seems that several years before the referee's report was made, upon which final judgment was entered, that action was, by the consent of the defendants' attorneys in it, discontinued. In view of those facts, there was no error available or prejudicial to the defendants founded upon such alleged defense in the entry of final judgment for the entire amount due the plaintiff for royalties. (*Kelsey v. Ward*, 16 Abb. Pr. 98; *Marston v. Lawrence*, 1 Johns. Cas. 397; *Averill v. Paterson*, 10 N. Y. 500.)

The plaintiff's appeal from the portion of the judgment affirming the part of the final judgment appealed from by her is founded upon her exceptions to the refusal of the referee to find that the defendants were liable to account to the plaintiff for illuminating tiles where they had inserted glasses in iron, which were adapted or could be used for illuminating roof of areas or basement extensions, and had not shown they were not so used. Also, that they were liable to account for all such tiles adapted to such use manufactured and sold by them to others to be used, as the defendants had not shown were not so used. The license to the defendants was not to merely manufacture and sell, and the patent, as represented by the license, was simply one of construction or combination. That is to say, they were to pay royalties for the use made of the illuminating tiles in the construction of coverings or roofs over basement extensions. They were not chargeable under the contract for such tiles sold unless they were applied to such use. And although adapted to that use they were equally applicable to illuminating roofs on other parts of buildings, over vaults, etc. The plaintiff's contention is that the burden was with the defendants to relieve themselves from liability to account for all such tiles as they sold to or glazed for others to be used; and that so much as they failed to prove were not used for such purpose they must account for. It is

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true it might be difficult for the plaintiff to trace to its destination the tile sold by the defendants over the territory mentioned in their license to see to what use it was applied, and it was less difficult for the defendants to know where it was taken by the purchasers, but they, no more than the plaintiff, could control the use made of the articles by the purchasers. There was no violation of any trust relation on the part of the defendants in making the sales for any purpose. And for anything appearing in the contract with the plaintiff it was their right to do so. While it was their duty to account for all of their sales which were used for the licensed purposes, they were not necessarily chargeable in that respect for certain of the tile sold by them, merely because they did not know or had not ascertained to what use they were in fact applied. It is unnecessary to determine what bearing a purpose of the defendants, by suppression, to defraud the plaintiff may have had upon the proposition, as no such question is presented for consideration. There was no error in the refusal of the referee to find as so requested.

The judgment should be affirmed, without costs to either party.

All concur.

Judgment affirmed. _____

JOSEPH L. SPOFFORD, Respondent, v. DAVID N. ROWAN,
Appellant.

At law a joint debt cannot be set off against a separate debt, or a separate debt against a joint debt, and equity will only interpose when the circumstances are such as to render it necessary in order to save the claim of a party, and the facts must be alleged entitling him to equitable relief.

In an action upon contract brought by one member of a firm, defendant may not avail himself of a claim against the firm as a set-off, on the ground of the insolvency of plaintiff's copartners, in the absence of an averment that the firm is insolvent.

Where such a claim was set up by defendant as a counter-claim, *held*, that the failure of plaintiff to reply did not entitle defendant to offset the claim, as the counter-claim does not set up a cause of action against

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plaintiff; also that it was not necessary for plaintiff to raise the question by demurrer. (Code Civ. Pro. § 499.)

It seems that where other persons are jointly liable upon a claim sought to be availed of as a set-off, they should be made parties, so that the rights of all may be determined.

(Argued December 8, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made the first Monday of January, 1887, which affirmed a judgment of the General Term of the City Court, in favor of plaintiff and affirmed a judgment entered upon a verdict in that court and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Henry C. Willcox for appellant. The court should have granted defendant's motion for judgment on the counter-claims. (Code Civ. Pro. §§ 501, 3174; 1 Field's Brief, § 93; *Campbell v. Routt*, 42 Ind. 410; *Allen v. Shoshad*, 15 Ohio, 145; *Xenia Bank v. Lee*, 2 Bosw. 694; *Vassear v. Livingston*, 13 N. Y. 248, 256; *Leavenworth v. Packer*, 52 id. 132; *H., etc., R. R. Co. v. L. I. R. R. Co.*, 48 Barb. 355; *Bathgate v. Haskins*, 59 N. Y. 539; *Coffin v. McLean*, 80 id. 564; *Davidson v. Alfaro*, Id. 660; *Smith v. Felton*, 43 id. 419; *Baker v. Hotchkiss*, 97 id. 409; *Clark v. Dillon*, 97 id. 370; *Hensley v. Tartar*, 14 Cal. 508; *Montour v. Purdy*, 11 Minn. 384; *Matteson v. Smith*, 19 Abb. Pr. 288; 1 Robt. 706; *Hammond v. Earl*, 5 Abb. [N. C.] 106, 107, 110; *Seward v. Miller*, 6 How. Pr. 312; 7 id. 438; 10 id. 74; 15 id. 371; 22 id. 152; 19 Abb. Pr. 97; *Leary v. Boggs*, 3 Civ. Pro. Rep. 227; *People v. Snyder*, 41 N. Y. 400; *McEno v. Decker*, 58 How. Pr. 500; *People v. N. R. R. Co.*, 58 Barb. 98, 101; 42 N. Y. 217; Code Civ. Pro. § 522; *Isham v. Davidson*, 52 N. Y. 237; *Fleischman v. Stern*, 90 id. 110; *Clinton v. Eddy*, 1 Lans. 61; *West v. A. E. Bank*, 44 Barb. 156; *Wird v. Whitney*, 31 id. 90; *Hamilton v. Hugh*, 13 How. Pr. 44; *Cook v. Baw*,

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44 N. Y. 156.) A reply waives the right to insist that matters set up are not proper subject of counter-claim. (*Lathrop v. Godfrey*, 3 Hun, 739; *Carpenter v. M. L. Ins. Co.*, 22 id. 49; *Hammond v. Terry*, 3 Lans. 186; *Ayers v. O'Farrell*, 10 Bosw. 143; *Smith v. Countryman*, 30 N. Y. 655; *Livingston v. Muller*, 8 id. 283.) The court denied the defendant's motion for judgment on the counter-claims at the close of plaintiff's case, and the defendant, without objection, introduced evidence to prove them. The defendant was entitled to have the issues thus tried upon the evidence passed upon by the jury. (*McIntyre v. Clapp*, 31 N. Y. 569; *Baldwin v. Burrows*, 47 id. 199; *Herrick v. Borst*, 4 Hill, 650; *Pettis v. Pier*, 1 Hun, 623.)

E. P. Johnson for respondent. The reply to the counter-claims was sufficient. (*Lewis v. Coulter*, 10 Ohio St. 514; Code Civ. Pro. § 723.) The evidence did not establish any valid counter-claims against the plaintiff, even if the defendant's own statements were taken as true, and a verdict for the defendant upon either counter-claim would have been properly set aside. (*Mynderse v. Snook*, 1 Lans. 488.)

HAIGHT, J. This action was brought upon a check for \$1,000, post-dated, which it was alleged was given upon a loan of that amount by the plaintiff to the defendant. The defense was that the money was paid by the plaintiff to the defendant to apply upon a pre-existing obligation, and that the check was given as a mere memorandum, without any intention that it should be paid.

Upon this issue the evidence was conflicting, and the rights of the parties were settled by the verdict. The chief question brought up for review arises out of the motion for judgment upon the counter-claims set up in the answer on the ground that they stand admitted by the pleadings. For the purpose of the argument, we shall assume that the denial set forth in the reply was defective.

The first to which our attention is called is set forth in the answer, both as a defense and counter-claim, and alleges in

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substance that the defendant had deposited the sum of \$2,500 with a firm of lawyers in Galveston, Texas, for the purpose of having certain taxes paid on a tract of land in Texas, sold by one Paul N. Spofford to the defendant; also on another tract of land comprising a sugar plantation known as Osceola, upon which the executors of Thomas Small, deceased, clients of the defendant, had made a loan of \$27,500 to Paul N. Spofford; that only \$1,050 was paid upon such taxes, leaving a balance in the hands of such attorneys of \$1,450; which sum it is alleged was to belong to the defendant, and was to be credited on a loan of \$10,000 made by him to the firm of Spofford Bros., of which the plaintiff, the said Paul N. Spofford, and one Gardner S. Spofford, were members; that the firm of Spofford Bros., with certain other persons named, were indebted to the lawyers with whom the deposit was made in the sum of \$2,000 for professional services, and that they were pressing their claim for payment; that the plaintiff thereupon wrongfully, and without the consent or knowledge of the defendant, wrote the said firm of attorneys in Galveston, to apply the balance of the \$1,450 in their hands upon the account of Spofford Bros., and to draw upon them for the balance; that afterwards when the defendant learned of the appropriation of the said \$1,450 he threatened to sue the plaintiff therefor, and thereupon the plaintiff paid him the sum of \$1,000 on account, which was the same \$1,000 pretended by the plaintiff to have been loaned to the defendant herein; and that the check mentioned in the complaint was given by the defendant to the plaintiff merely as a memorandum at the request of the plaintiff for the purpose of showing the same to Paul N. Spofford, if it should be necessary, so that he should not know that the plaintiff had paid the defendant the sum of \$1,000 on the account aforesaid. The defendant further alleges that the plaintiff also agreed to pay him the further sum of \$450, being the balance of the said sum of \$1,450.

It will be observed that the matter pleaded herein pertaining to the \$1,000 transaction, amounts to a defense to the cause of action set forth in the complaint, and is in no sense a counter-

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claim; that only the matter alleged pertaining to the agreement to pay the \$450 constitutes a counter-claim. As to that counter-claim, the denial appearing in the reply is specific and sufficient, and this is recognized by the defendant, for in his motion for judgment upon the counter-claim he excepts the \$450 claim.

The question in reference to the agreement to pay the defendant \$450, together with the questions raised by the matter pleaded as defense, were submitted to the jury and were determined by its verdict.

The other counter-claim alleged in substance that the defendant had loaned to the copartnership of Spofford Bros., composed of the persons aforesaid, the sum of \$10,000, and that there was still a balance due upon such loan of \$5,959.86; that Paul N. Spofford and Gardner S. Spofford are insolvent; that the plaintiff is solvent, and demands that the same may be counter-claimed against any amount that may be found due the plaintiff upon the trial of this action, and that the defendant may have judgment for the balance, with interest, etc.

The defendant, therefore, seeks to offset against the claim of the plaintiff, one which he holds against the firm of Spofford Bros., of which the plaintiff is a member. He claims the right to do this upon the theory that the plaintiff has failed to reply to the counter-claim, alleging that others are liable with him as copartners upon the defendant's claim, and the case of *Briggs v. Briggs* (20 Barb. 477; affirmed 15 N. Y. 471), is relied upon as sustaining this claim. But our examination of those cases leads us to the conclusion that they have been misunderstood and that they do not support the claim made. It is said that insolvency of one of the parties is sufficient ground for the allowance of a set-off in equity. Very true, where the plaintiff has a claim against the defendant, and the defendant has one against the plaintiff, the insolvency of the plaintiff furnishes sufficient ground for the interposition of equity; but that is not the case with a single member of a firm where there is no allegation that the firm is insolvent, and where its members are not parties to the action. One

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member of a firm may be insolvent and yet the firm may be solvent; and where other parties are jointly liable upon a claim they should all be made parties so that the rights of all may be determined. At law a joint debt cannot be set off against a separate debt, or conversely, a separate debt against a joint debt, and equity will only interpose under circumstances in which it is necessary in order to save the claim of a party, and to do this the facts must be alleged entitling the party to equitable relief. (Pomeroy on Remedies and Remedial Rights, § 756; *Perry v. Chester*, 12 Abb. [N. S.] 131; *Mynderse v. Snook*, 1 Lans. 488; *Lush v. Adams*, 10 Civ. Pro. R. 60; *Parker v. Turner*, 8 N. Y. S. R. 500; *McCulloch v. Vibbard*, 51 Hun, 227; *Cummings v. Morris*, 25 N. Y. 625; *Howard v. Shores*, 20 California, 277; *Ingols v. Plimpton*, 10 Colorado, 535; *Baker v. Kinsey*, 41 Ohio St. 403-408.)

We consequently are of the opinion that as to this counterclaim the defendant failed to allege a cause of action against the plaintiff, and, therefore, the motion for judgment thereon was properly denied.

It may be claimed that the question should have been raised by demurrer thereto, but this is not necessary under section 499 of the Code of Civil Procedure.

These views render it unnecessary to consider the other questions raised in the case.

The judgment should be affirmed, with costs.

All concur except FOLLETT, Ch. J., and POTTER, J., not voting.

Judgment affirmed.

Statement of case.

WARREN BEMAN, Appellant, v. LOUIS L. TODD, Respondent.

Where an action is one in which the right is given the plaintiff, by the Code of Civil Procedure (§ 1670), to file a notice of pendency, the right is absolute, not resting in the discretion of the court, and if the notice is properly filed, it may not be canceled save in the manner prescribed by the Code (§ 1674).

In an action brought, among other things, to charge certain real estate with moneys alleged to have been wrongfully invested therein by the defendant, the complaint was dismissed; on appeal the General Term reversed the judgment and granted a new trial, but directed the complaint and notice of pendency to be amended by striking out all allegations concerning said real estate. No motion for an amendment had been made and the record did not disclose the existence of any of the causes prescribed for the cancellation of the notice, or that counsel on either side were heard upon the question. *Held*, that the General Term had no power to direct the notice of pendency to be so amended as to cancel and destroy it.

When an appeal is taken to this court from a provision inserted in an order of General Term granting a new trial, which the court had no authority to make, the stipulation, that in case of affirmance, judgment absolute shall be rendered against the appellant, required by the Code (Subd. 1, § 191) need not be given.

(Argued December 9, 1890; decided January 14, 1891.)

APPEAL from certain provisions of an order of the General Term of the Supreme Court in the first judicial department, made the first Monday of October, 1886, which reversed a judgment in favor of defendant entered upon the report of a referee, and granted a new trial.

The portion of the order appealed from is set forth in the opinion.

Moody B. Smith for appellant. The General Term reversed wholly the judgment of the Special Term. This entirely exhausted the power of the court, except the order for a new trial, which necessarily followed. (Code Civ. Pro. § 1317; *Gracie v. Freeland*, 1 N. Y. 234.) The General Term cannot sever the issues of a case and grant a new trial as to one issue and render final judgment as to the other. (*Story v. N. Y. & H. R. R. Co.*, 6 N. Y. 85.) The General Term had no power to

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order the plaintiff to amend his complaint as set forth in the order appealed from. (*Averill v. Taylor*, 5 How. Pr. 476; *Jones v. Norwood*, 5 J. & S. 276; *Starkweather v. Bromer*, 18 Hun, 346; Story's Eq. Pl. 267.) The court had no power to cancel the notice of pendency of action, either directly or indirectly, except as provided in section 1674 of the Code of Civil Procedure. (*Mills v. Bliss*, 55 N. Y. 139; *Wilmont v. Mesole*, 8 J. & S. 274.)

J. Warren Greene for respondent. Plaintiff's case rests solely upon evidence as to certain verbal statements which are claimed to be admissions on the part of Todd. Such evidence, without other proof of the relation of debtor and creditor existing between the parties at the time of or previous to the transaction, is insufficient to warrant a court in declaring a deed, absolute on its face, a mortgage. (*Nicholls v. McDonald*, 101 Penn. St. 514; *Burger v. Dankel*, 100 id. 113; *Null v. Fries*, 3 East. Rep. 384; *Longdon v. Clouse*, 3 id. 357; *Walker v. Dunspaugh*, 20 N. Y. 170; *Jackson v. Shearman*, 6 Johns. 22; *Jackson v. Mayh*, 7 id. 186; *Jackson v. Miller*, 6 Cow. 752; *Work v. Rabe*, 96 N. Y. 423.)

FOLLETT, Ch. J. This action was brought to charge a lot on Twenty-seventh street, two lots on Forty-first street and one lot on Broadway in the city of New York with the payment of \$40,000, or so much as should be found due the plaintiff on an accounting, alleged to have been wrongfully invested by the defendant in those pieces of real estate. The action was tried before a referee, who made a report directing that the complaint be dismissed on the merits, with costs, on which a judgment was entered, which was reversed by the General Term and a new trial granted, costs to abide the event, for an error committed by the referee in requiring the plaintiff to call and swear Mr. Woodward as a witness. The order appealed from granted a new trial to be had before a referee named in it, with costs to abide the event, but, in addition, it directed that the complaint and notice of pendency of action be amended by striking out all allegations concerning the lots

Opinion of the Court, per FOLLETT, Ch. J.

on Twenty-seventh, Forty-first streets and Broadway, thus depriving the plaintiff of the right of establishing any lien upon those lots in case he should succeed in the action. From this part of the order the plaintiff appealed to this court. This action is one in which the plaintiff had the right to record a notice of its pendency. (Code C. P. § 1670; *Mills v. Bliss*, 55 N. Y. 139.) This right was an absolute one, not resting in the discretion of the court, but conferred by statute, and having been properly filed, it cannot be canceled except pursuant to section 1674 of the Code of Civil Procedure. (*Mills v. Bliss*, *supra*; *Wilmont v. Meserole*, 9 J. & S. 274; *Brainerd v. White*, 16 id. 399; *Niebuhr v. Schreyer*, 13 Daly, 546.)

No motion for an order directing the amendment of the complaint, or of the *lis pendens*, was made, and the record does not disclose the existence of any of the causes prescribed by section 1674 for the cancellation of the notice, nor does it disclose that either counsel was heard upon the question. Upon such a record, and under such circumstances, the General Term was without power to direct that the notice of the pendency of the action be so amended as to cancel and destroy it.

The objection is made that the plaintiff did not stipulate that if the order appealed from is affirmed judgment absolute shall be rendered against the appellant as required by subdivision 1 of section 191 of the Code of Civil Procedure. It will be observed that the plaintiff has not appealed from that part of the order granting a new trial, or from any portion of it which the General Term had power to grant, but limited his appeal to the clause which, in effect, canceled the notice of the pendency of the action and amended the complaint without a hearing. When an appeal is taken from a provision inserted in an order granting a new trial which the court had no authority to make because the question so decided was not presented by the record, the stipulation need not be given.

The part of the order appealed from should be reversed, with costs.

All concur.

Ordered accordingly.

Statement of case.

EDMUND BLUNT, Appellant, v. ELMER BARRETT, Respondent.

124	117
127	506
124	117
78	AD ³ 55

The complaint herein alleged in substance that defendant wrongfully removed plaintiff's yacht from a certain place in the East river, where she had been laid up for the winter, to another place where she was exposed to danger and that in consequence she sunk and was greatly damaged. Defendant's answer admitted plaintiff's title, the taking and sinking of the yacht, but denied that the taking was wrongful and alleged it was his duty as custodian of the yacht, to remove her to a safe place and that he removed her where he had no reason to apprehend danger. The court charged that "the burden of proof is upon plaintiff and he must establish by a preponderance of evidence that the vessel was removed without authority and without color of authority." *Held*, error; that, under the pleadings, the burden was upon defendant of showing some right to remove the yacht by way of justification.

As a rule the burden of proof remains where the issue made by the pleadings places it, although the weight of the evidence on one side may have a controlling effect unless met by proof of the other party.

Blunt v. Barrett (22 J. & S. 548), reversed.

(Argued December 9, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 18, 1887, which affirmed a judgment in favor of defendant entered upon a verdict and affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

James A. Briggs for appellant. The court erred in charging that the burden of proof was upon plaintiff, and that he must establish by a preponderance of evidence that the removal of the vessel was without authority and without the color of authority. (*Heinemann v. Heard*, 62 N. Y. 448.) The ownership of the yacht by plaintiff and the taking by defendant being admitted by the pleadings, plaintiff's case was fully established and no further evidence was required on his part to show conversion. (*Morris v. Danielson*, 3 Hill, 168; *Brower v. Peabody*, 13 N. Y. 121, 126; 1 Greenl. on Ev. [13 ed.] 193;

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Ely v. Ehle, 3 N. Y. 506; *Demick v. Chapman*, 11 Johns. 132; *Butterworth v. Soper*, 13 id. 443; Waite's Act. & Def. 95-110; *Harvey v. Dunlop*, H. & D. Supp. 193; *Haight v. Price*, 21 N. Y. 241; *Bassett v. Porter*, 10 Cush. 420.)

Charles Blandy for respondent. The burden of proof lay upon the plaintiff to show the facts alleged. (*Heulman v. Lazarus*, 90 N. Y. 672; *Banker v. Banker*, 63 id. 409; *Slocovich v. O. M. Ins. Co.*, 108 id. 66; *Cranston v. N. Y. C. & H. R. R. Co.*, 103 id. 614; *Sperry v. Miller*, 16 id. 407; *Caldwell v. N. J. Co.*, 47 id. 282; *Christ v. Erie*, 58 id. 638.) Even if the trial judge erred in refusing the request to charge, such refusal furnishes no ground for a new trial, because substantial justice does not require a new trial. (Code Civ. Pro. § 1003; *Post v. Mason*, 91 N. Y. 539; *Smith v. Lapham*, 87 id. 631.)

BRADLEY, J. The action was brought for an alleged wrongful taking by the defendant of the plaintiff's yacht from a certain place where she had been laid up for the winter to another place in the East river where she sunk and was greatly damaged.

The question here arises upon the plaintiff's exception taken to the charge of the court to the jury that "the burden of proof is upon the plaintiff and he must establish by a preponderance of evidence that the removal of the vessel was without authority and without color of authority." This calls attention to the issue presented by the pleadings by which it appears that the plaintiff alleged his title to the yacht at the time in question; and charged that the defendant wrongfully took her from the Knickerbocker Club grounds at Port Morris in the county of Westchester, to the foot of East One Hundred and Nineteenth street in the city of New York, and there attached the yacht to a buoy, where she was subjected to the rising and falling of the tide and exposed to danger; and that the yacht sunk and was injured. The defendant by his answer admitted the plaintiff's title, and that he (defendant) took the yacht from and to the places mentioned in the complaint, and

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that she sunk ; denied that he wrongfully took the vessel there, and alleged that he had the right and it was his duty towards the plaintiff as the custodian of her to remove the yacht to some safe and convenient place ; and that he removed her from the place first mentioned to the foot of East One Hundred and Nineteenth street where he had no reason to apprehend any harm to the vessel. It must be assumed under our system of pleadings that the plaintiff took issue upon those allegations justifying the taking, and therefore, the affirmative of such issue was with the defendant. The burden was with the defendant to establish this affirmative defense of justification of the taking so alleged by him ; and it was error for the court to charge the jury that the burden to prove the contrary was with the plaintiff. (*Heinemann v. Heard*, 62 N. Y. 448.)

When the defendant admitted the taking and the plaintiff's title his defense was dependent upon some right by way of justification to take and remove the yacht, and that was essentially matter to be pleaded by him to render evidence of the fact admissible as a defense. (*Demick v. Chapman*, 11 Johns. 132.) And the burden of proof by the issue so made, having been taken by the defendant was not shifted to the plaintiff at the trial. As a rule it remains where the issue made by the pleadings places it, although the weight of the evidence on one side may have a controlling effect unless met by proof of the other party. (*Heilman v. Lazarus*, 90 N. Y. 672.)

It may be that the attention of the court was not specifically called to the pleadings, and it may be, as suggested in the court below, that the charge in question did not, in fact, have any influence on the result, but it cannot be seen that it may not have prejudiced the plaintiff ; and, therefore, the error cannot be disregarded on review.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

SARAH CHARLOTTE CLARK, Appellant, v. MOSES DEVOE,
Respondent.

The primary rule for the interpretation of a covenant, as well as other contracts, is to gather the intention of the parties from the words, by reading not simply a single clause, but the entire context, and, where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered.

Only by the use of plain and direct language by a grantor will it be held that he created a right in the nature of an easement attached to one parcel of land, making another servient thereto for all time.

A deed from defendant of a lot in the city of New York, after reciting that the grantor was the owner of an adjoining lot, contained a covenant on his part, "for himself, his heirs, executors, administrators and assigns, * * * to and with the said party of the second part (the grantee), his heirs executors, administrators and assigns, that he will not erect, or cause to be erected, on said lot * * * any building which shall be regarded as a nuisance, or which shall be occupied for any purpose which may render it a nuisance." Plaintiff, through various mesne conveyances, has acquired title to the lot conveyed. Defendant conveyed the adjoining lot by a deed which did not refer to said covenant, and contained no restriction or limitation upon the uses to which it might be put. Subsequently a building was erected thereon which was used as a livery stable so as to constitute a nuisance. Defendant neither caused nor permitted the nuisance. In an action upon the covenant, held, that it was personal to defendant, and solely against his own acts; that it did not make him liable for the acts of his grantees or subsequent owners; and so, that no cause of action was established against him.

Phoenix Ins. Co. v. Contl. Ins. Co. (87 N. Y. 400); *L. C. & D. R. Co. v. Bull* (47 L. T. R. 413); *Norman v. Wells* (17 Wend. 136), distinguished. Reported below, 48 Hun, 512.

(Argued December 9, 1890; decided January 14, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 22, 1888, which reversed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

This was an action to recover damages for the breach of a covenant contained in a deed from the defendant to the grantor of the plaintiff.

In April, 1857, the defendant owned two adjoining parcels

124	120
130	557

124	120
142	561

124	120
147	467

124	120
75 AD	599

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of land in the city of New York, with the buildings thereon, known as No. 22 and No. 24 West Tenth street, and on the fifteenth of that month he conveyed the premises known as No. 24 to one Robert Clarke by a deed which contained the following covenant, viz: "And the said Moses Devoe, being also the owner of the adjoining lot known and distinguished as No. 22 Tenth street, for himself, his heirs, executors, administrators and assigns, does hereby covenant to and with the said party of the second part, his heirs, executors, administrators and assigns, that he will not erect, or cause to be erected, on said lot number twenty-two Tenth street, any building which shall be regarded as a nuisance, or which shall be occupied for any purpose which may render it a nuisance." Subsequently the plaintiff, by various mesne conveyances, acquired the title of said Robert Clarke to No. 24, and before the 8th of July, 1885, when this action was commenced, she also acquired by several assignments from her respective grantors, all claims or causes of action to them respectively belonging by reason of any violation of said covenant by the defendant. On the 24th of June, 1863, the defendant conveyed No. 22 to one Johnston, without alluding to said covenant and without any restriction or limitation upon the uses to which the premises might be devoted. Prior to January 1, 1864, a building was erected by said Johnston on No. 22, which for several years was used as a private stable, but was afterward converted into a livery stable and so used, according to the verdict of the jury, as to constitute a nuisance.

This action was brought to recover damages from the defendant for violating the covenant aforesaid by permitting such nuisance to exist upon said premises. Upon the trial, it appeared that the defendant neither caused nor permitted the nuisance, but that the same was created and maintained by his grantees and their lessees, without his consent.

Further facts are stated in the opinion.

David Gerber for appellant. The erection and maintenance of the nuisance was a breach of the covenant, rendering the

Statement of case.

defendant liable in damages. (*P. Ins. Co. v. C. Ins. Co.*, 87 N. Y. 400; *Wilcox v. Campbell*, 35 Hun, 254; *Watertown v. Cowen*, 4 Paige, 510; *L. C. & D. R. Co. v. Buel*, 47 L. T. 413; *Hodge v. Sloan*, 107 N. Y. 244; *Hunt v. Lyon*, 90 id. 663; *Norman v. Wells*, 17 Wend. 136.) The action was not barred by the Statute of Limitations. (*Daniells v. Eddy*, 102 N. Y. 423; *Long v. Stafford*, 103 id. 27; *Neale v. Suley*, 47 Barb. 314; Wood on Nuisances, §§ 710, 718; *Uline v. N. Y. C. R. R. Co.*, 101 N. Y. 98; *Colrick v. Swinburne*, 105 id. 503; *Reed v. State*, 108 id. 407; *Chapman v. City of Rochester*, 110 id. 273.) The proper rule of damages was applied. The recovery was limited to the actual loss in rental value up to the time of the commencement of the action, the amount expended in making repairs caused by the nuisance, and to damages for personal discomfort. (*Francis v. Schoellkope*, 53 N. Y. 152; *Ulmer v. N. Y. C. & H. R. R. R. Co.*, 101 id. 98; Wood on Nuisances, § 37; *B. & P. R. R. Co. v. F. B. Church*, 108 U. S. 317.) The question whether the stable was so conducted as to render it of the least possible objection to the surrounding tenants was properly excluded, and the request to charge that if the jury believe the stable was well kept their verdict must be for defendant, was justly refused. (*McKeon v. See*, 4 Robt. 449-465; *Hay v. Cohoes Co.*, 2 N. Y. 159; *Tremain v. Cohoes Co.*, Id. 163; *Heeg v. Licht*, 80 id. 579-582; *Judson v. Easton*, 58 id. 664.)

Freling H. Smith for respondent. The covenant is a personal covenant as to the defendant. And even if this were not so, it does not run with the land of Clarke, so as to make the covenantor personally responsible on the covenant for damages for the acts of subsequent owners. It is neither alleged nor claimed that the defendant has erected, or caused to be erected, the stable in question. (*McKeon v. See*, 51 N. Y. 300; *Van Rensselaer v. Hays*, 19 id. 68; *A. D. Co. v. Leavitt*, 54 id. 35; *Trustees, etc., v. Thacher*, 87 id. 316; *Trustees, etc., v. Cowan*, 4 Paige, 510; *Hills v. Miller*, 3 id. 254; *K. I. Co. v. F. S. Street, etc., R. R. Co.*, 16 J. & S. 489, 501; *Spencer's*

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Case, Smith's L. C. 110-112.) The burden of the covenant in this case does not run with the lot No. 22 to bind the covenantor's grantee and subsequent grantees. Then the lot No. 22 in respect of the covenant is not servient to the lot No. 24. There is, therefore, on the facts proved, no breach of covenant, and the action fails. (*P. Ins. Co. v. C. Ins. Co.*, 87 N. Y. 400.) The covenant must be fairly construed, and its meaning must not be extended into a covenant that the defendant will pay all damages that may result from any subsequent owner or lessee erecting, or causing to be erected, a building, the improper use of which may render it a nuisance. (*Quackenboss v. Lansing*, 6 Johns. 49; *Duryea v. Mayor, etc.*, 62 N. Y. 592, 597; *Beach v. Crain*, 2 id. 86, 93; 4 Wait's Act. & Def. 755.) Plaintiff's claim against the defendant, if she has any, being for breach of covenant, is barred by the Statute of Limitations, as the breach of covenant, if any, was proved to have occurred over twenty years prior to the commencement of the action. If there was any conflict of evidence on this subject, it became a question of fact and should have been submitted to the jury. (3 Pars. on Cont. 92; *Fish v. Folley*, 6 Hill, 54; *Schell v. Plumb*, 55 N. Y. 592; *Hamilton v. Wilson*, 4 Johns. 72; *E. I. Co. v. Paul*, 7 Moore, 85.)

VANN, J. This is not an action in equity to restrain the continuance of a nuisance, nor in tort, to recover the damages caused by a nuisance, but is simply for a breach of the covenant set forth in the foregoing statement. It is not brought against one, who personally or through his agents or tenants, created the nuisance, nor against one who owned the property at any time when the nuisance existed thereon, but against a former owner of two city lots, who in selling one, many years ago, made said covenant with reference to the other, which he soon conveyed away, and since then he has had no interest in either. The covenant, therefore, is not only the foundation of the plaintiff's claim, but is the limit of the defendant's liability. It is not denied that the plaintiff had a remedy for the nuisance against those who caused it, independent of any covenant, but

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this action depends strictly upon the covenant, and can be maintained only by showing a breach thereof.

A covenant is simply a contract of a special nature, and the primary rule for the interpretation thereof is to gather the intention of the parties from their words, by reading not simply a single clause of the agreement, but the entire context and, where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered when their minds met. (*Quackenboss v. Lansing*, 6 Johns. 49; *Duryea v. Mayor, etc.*, 62 N. Y. 592, 597.; *Western New York Ins. Co. v. Clinton*, 66 id. 326; Platt on Covenants, 136.)

The deed under consideration is in the ordinary form, except that between the *habendum* clause and the usual covenants contained in modern conveyances, the paragraph in question was inserted, consisting of a single sentence. This covenant is purely negative in character and has no relation to the land conveyed, but relates wholly to other premises owned by the covenantor and in which the covenantee had no interest. There was no agreement that the premises should not be used for certain purposes, or that they should be free from nuisances forever. There was no corresponding covenant by the grantee restricting the use that he might make of the premises conveyed to him, so that the restrictions might be mutual and uniformity of use thus secured. No special object to be attained by the covenant is apparent, because both parcels of land were tenement-house property, situated on a back street and surrounded by buildings of an inferior character.

In construing the covenant, it is to be observed that the grantor, although speaking for himself and his successors, to the grantee and his successors, confined the restriction to himself alone, by agreeing that he, the grantor, would neither erect nor cause to be erected any building that should be regarded as a nuisance. According to the literal, and hence natural, interpretation of this language, the parties meant that the grantor should not personally do or cause to be done any of the inhibited acts. No doubt could arise as to the correctness of this construction, if the parties had not agreed in behalf

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of themselves and their assigns. The substance of the covenant, however, is limited to the covenantor, and purports to restrict his action only. While the capacity in which he assumes to contract is in behalf of himself and others, the actual contract, or the thing agreed not to be done, is limited to his own acts. Clearly the inconsistency cannot be dispelled by subordinating substance to form, or by holding that the actual agreement is of less importance than the capacity in which it was made.

The learned counsel for the plaintiff contends that the covenant should be read distributively, or as if the grantor had written: "I covenant for myself that I will not build, etc., I covenant for myself, my executors and administrators, that neither I nor they will so build, and I covenant for my assigns that they will not so build;" but the objection to such a construction is that it requires something to be inserted that the grantor never assented to. He did not agree that his executors, or his administrators, or his assigns should not build, but only that he would not build. He used no words that connected anyone except himself with the restriction against building, or that imposed an obligation in that regard upon any other person. It was not a general covenant "not to erect," as in *Phoenix Ins. Co. v. Continental Ins. Co.* (87 N. Y. 400), but a special covenant that the grantor would not erect, showing an intention to contract against the acts of one person only.

While effect should be given to every word of a written instrument, if possible, it is necessary sometimes to reject a part as surplusage, and it is never allowable in order to prevent that, or to effect any other result, to insert that which the parties did not agree to. A personal covenant binds the heirs, executors and administrators in respect to assets, so that the word "assigns" only need be rejected as surplusage, in order to relieve the case of all difficulty. A strained construction that has no foundation to rest upon except the single word "assigns," used in the descriptive and unsubstantial way already mentioned, should not be resorted to when it involves

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a serious result to the grantor with but slight benefit to the grantee, because it is improbable that under such circumstances such a result was intended. Hence only by the use of plain and direct language of the grantor, should it be held that he created a right in the nature of an easement and attached it to one parcel as the dominant estate and made the other servient thereto for all time to come. We think that the language used by the parties permits no such result. We agree with the learned General Term that the construction contended for by the plaintiff "would be giving a scope to the covenant far beyond what the language used requires and beyond what the grantees of lot No. 22 had a right to assume in accepting a conveyance of that lot. An incumbrance affecting lot No. 22 for the sole benefit of lot No. 24, and in a conveyance of lot No. 24, into which a purchaser would hardly look for incumbrances upon lot No. 22, will not be inferred by a forced construction of the covenant or any amplification of its language beyond its natural meaning."

In the *London, Chatham & Dover Railway Company v. Bull* (47 Law Times Rep. 413), upon which the plaintiff relies, the title of the grantee and his lessees was subject to the covenant. The entire language used by the contracting parties, and the circumstances surrounding them when they contracted, showed an unmistakable intention that the restriction should be permanent and apply to anyone who owned or occupied the land. The grantee was the covenantor, and the court did not hold him liable on his covenant for the acts of his assigns, but awarded an injunction against the owners and occupants. While we are unable to concur in all that was said by the court in that case, we do not regard the result as opposed to the principle of our judgment upon this appeal.

In *Norman v. Wells* (17 Wend. 136) the defendant was held liable upon the ground that the act claimed to have been a violation of the covenant was his own act, "of which he is annually receiving the avails by way of rent."

We think that the covenant in question was personal to the defendant, and was solely against his own acts; that it did not

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make him liable for the acts of his grantees or of the subsequent owners, and that, as he neither did the acts complained of, nor caused them to be done, no cause of action was established against him.

The order should be affirmed and judgment absolute rendered against the plaintiff, with costs.

All concur.

Order affirmed and judgment absolute for defendant.

DAVID STEWART, Appellant, v. COLLIS P. HUNTINGTON,
Impleaded, etc., Respondent.

Plaintiff entered into a contract with the defendants for the sale to them of certain shares of stock of a railroad company owned by him, by the terms of which defendants agreed to pay him, on delivery of the shares, a price specified per share, and in case any other person had been or should be paid by or on account of the defendants, or either of them, any higher price per share for any of the stock of said railroad company, that defendants would pay to plaintiff on demand, in addition to the amount so to be paid to him on delivery, the difference between that amount and the highest price paid to others, and in case, during or after a contemplated visit of one A. to California, plaintiff should become dissatisfied with the sale, that defendants would, upon demand, return to him the shares of stock so sold and delivered by him, and would consent to the cancellation and rescission of the sale. In an action upon the contract the complaint, after setting forth its terms, alleged the delivery of the stock, its acceptance, and the payment to plaintiff of the price specified; also, that afterwards, and during the visit referred to in the contract, plaintiff became dissatisfied, duly notified the defendants thereof, and demanded the return to him of the stock and the cancellation and rescission of the sale, offering to pay to defendants the amount paid to him on delivery with interest, but that defendants neglected, and refused to return the stock or to cancel the sale. It also alleged that defendants paid to other persons higher prices per share for stock of the same railroad company. *Held*, that the complaint set forth two causes of action, one in affirmance of the contract to recover the additional price agreed to be paid, the other based upon the theory of the rescission of the contract and a refusal of defendants to return the stock which would entitle defendants to recover its value as for a conversion: that said causes of action were inconsistent; and that a decision of the

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court on trial requiring the plaintiff to elect as to which cause of action he would rely upon was proper

Plaintiff elected to rely upon his claim for the higher price alleged to have been paid by defendants to others. To sustain this branch of the case plaintiff gave evidence to the effect that a corporation was organized for the purpose of constructing the railroad in which defendants were the principal stockholders; that certain owners of stock of said railroad company brought actions against said corporation and the defendants and others, to recover moneys belonging to the railroad company alleged to have been misappropriated by the officers of said corporation, and for other relief, that said actions were settled by the construction company; that it paid to one B., who brought one of said actions and who was owner of 200 shares of the railroad stock, the sum of \$85,000 in settlement of his suit, it taking a transfer of his stock. It did not appear that in the settlement made anything was said in reference to the amount to be allowed or paid for the stock. *Held*, that this was not a sale within the meaning of the contract; that it contemplated the voluntary purchase of stock by the defendants, and not the amount paid in the compromise of an action, and so, that the evidence furnished no basis upon which a verdict for the plaintiff could have been entered.

(Argued December 9, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made at the May term, 1888, which affirmed a judgment entered upon a verdict for the defendant Huntington directed by the court.

The nature of the action and the material facts are stated in the opinion.

Joseph H. Choate for appellant. The point upon which the defendant based his motion to direct a verdict for defendant and upon which the General Term relied in its decision, namely, that the contract had been rescinded by the action of the plaintiff in demanding a return of the stock, compliance with which demand was refused by Huntington on the false plea of inability to make a return, was not well taken. (Bishop on Cont. [2d ed.] §§ 812, 820; 2 Chitty on Cont. [11th ed.] 1089; *Johnston v. Trask*, 116 N. Y. 136; *Holtz v. Schmidt*, 59 id. 253; *Melvin v. L. Ins. Co.*, 80 Ill. 446; *Litchfield v. Irvin*,

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51 N. Y. 60, 61.) The proper construction of the contract is, that it related in both its branches to the shares of the old company embraced within the issue of \$8,500,000 and \$20,000,000, and it was the manifest duty of the court to instruct the jury accordingly. (*Groate v. Gile*, 51 N. Y. 431; *Dwight v. G. L. Ins. Co.*, 103 id. 352; *Short v. Woodward*, 13 Gray, 86, 88; *Pratt v. Langdon*, 12 Allen, 544, 546; *Globe Works v. Wright*, 106 Mass. 207, 216; *Hoffman v. A. Ins. Co.*, 32 N. Y. 405; *Murray v. Bethune*, 1 Wend. 191; *Stoddard v. Ham*, 129 Mass. 383, 385, 386; *Riley v. Mayor, etc.*, 96 N. Y. 339.) If there was anything to leave to the jury, or if Huntington had not admitted the subsequent purchase at \$400 per share, as a purchase within the meaning of the contract, that fact was fully established by the evidence in regard to the Brannan and Lambard purchases; and that evidence fully establishes a purchase at a higher price within the meaning of the contract, and the General Term was in error in holding the contrary, and in refusing to submit the question to the jury. (*Vandermulen v. Vandermulen*, 108 N. Y. 195.)

James C. Carter for respondent. Where by contract a party has an election between rights, the election once exercised is gone forever. (23 Abb. [N. C.] 145; *Garrison v. Marie*, 1 How. Pr. [N. S.] 356; *N. Y. F. Ins. Co. v. Lawrence*, 14 Johns. 55; *Morrell v. I. F. Ins. Co.*, 33 N. Y. 448, 449, 451; *Dinsmore v. Duncan*, 57 id. 580; *Wynkoop v. N. F. Ins. Co.*, 91 id. 478; *Andrews v. Æ. Ins. Co.*, 92 id. 596; *Layton v. Pearce*, Doug. 15; *Brown v. Slee*, 103 U. S. 836; *Jones v. Carter*, 15 M. & W. 718; *Dendy v. Nicholl*, 4 C. B. N. S. 376; *Grimwood v. Moss*, L. R. [7 C. P.] 366; *Doer v. Birch*, 1 M. & W. 406; *Brown v. R. Ins. Co.*, 1 E. & E. 853; *Kennedy v. Mills*, 13 Wend. 553.) Plaintiff's contention that the exercise of the election did not rescind the sale unless Huntington should comply with the demand and return the stock is erroneous. (*Morrell v. I. F. Ins. Co.*, 33 N. Y. 429.)

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HAIGHT, J. This action was brought against Collis P. Huntington, Leland Stanford and Charles Crocker, as survivors of Mark Hopkins, deceased. None of the defendants except Huntington were served with summons or complaint, and none of the other defendants have appeared in the action. The case has been three times tried. The first resulted in a disagreement of the jury; the second in a verdict for the plaintiff for \$102,923.82, on which a judgment was entered which was reversed by the General Term, and the third in a direction of a verdict for the defendant by the court, which is the one now under review.

This action was brought upon an alleged breach of contract on the sale of stock, and for balance of the purchase-price claimed to be due and unpaid. On or about the 21st day of April, 1870, the plaintiff was the owner and holder of 200 shares of the capital stock of the Central Pacific Railroad Company. On or about that day he entered into a contract with the defendants for the sale to them of the stock, the terms of which, as alleged in the complaint, are as follows, that is to say: "That upon the delivery of such shares of stock to the defendants, or to such persons or parties as the said defendants, through the said Collis P. Huntington, should direct, said defendants would pay to the plaintiff a sum equal to one hundred dollars, with interest thereon, at seven per cent per annum, from the first day of September, 1864, upon each share so delivered; that in case any person or party other than the plaintiff had been or should be paid by or for account of the defendants, or either or any of them, or said Central Pacific Railroad Company, any higher price per share for any share or shares of stock of said railroad company, than the price per share so to be paid to the plaintiff on the delivery of his stock, then and in that case the defendants would pay to the plaintiff on demand, in addition to the amount so to be paid to him on the delivery of such shares of stock, the difference between the amount so paid to him on the delivery thereof and the value of such two hundred shares of stock at the highest price per share paid by or for account of the defendants, or either or

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any of them, or said railroad company, to any person or party other than the plaintiff for any share or shares of stock of said railroad company; and that in case, during or after the then contemplated visit to California of William H. Aspinwall (who had also sold certain shares of stock of said railway company to the defendants upon the like terms), the plaintiff should become or be dissatisfied with such sale of his said stock to the defendants, the defendants would, upon demand, return to the plaintiff the shares of stock so sold and delivered by him as aforesaid, and would consent to the cancellation and rescission of the said sale."

The complaint further alleges, in substance, that, under and in pursuance of the contract, the plaintiff was directed by the defendant Huntington to deliver the stock to the firm of Fisk & Hatch, who were doing business in the city of New York; that he did, pursuant to such directions, deliver the stock to that firm, who accepted the same and paid the plaintiff therefor \$100 per share, with interest thereon from the 1st day of September, 1864, as per the agreement; that afterwards and during the visit of William H. Aspinwall to California, the plaintiff became and was dissatisfied with such sale of his stock to the defendants, and duly notified the defendants thereof, and demanded the return to him of the stock so sold and delivered to the defendants, and the cancellation and rescission of the said sale, and offered to pay to the defendants the amount so paid to him on the delivery of the stock, with lawful interest thereon, but the defendants wholly neglected and refused to return such stock or any part thereof, or to consent to the cancellation and rescission of the sale.

It also alleges that there were paid by or for account of the defendants to other persons, higher prices per share for stock of the said railroad company than the price paid to the plaintiff by the defendants; that they purchased stock of one Charles A. Lombard, to whom they paid at the rate of \$400 per share, or thereabouts.

The testimony given on behalf of the plaintiff in substance supports the allegation of the complaint. The plaintiff, in

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speaking in reference to the contemplated visit of Mr. Aspinwall to California, asked the defendant to leave the matter open until Mr. Aspinwall had been there, and could look the matter over and decide whether they had better sell or not; that Mr. Huntington replied to the effect that he could not leave the option open, but stated that "if Mr. Aspinwall is not satisfied with the sale when he gets out there, I will return your stock, and you can pay back the money that you get." The plaintiff further testified that he then asked him: "Will you agree that we shall receive as much for our stock as you pay to anybody else? He said: 'Yes; I will agree to that.' Then Mr. Aspinwall or myself said to him: 'We will agree, then, to your proposition, that you buy our stock and pay us par and interest from 1864.'" He further testified to the effect that Huntington made some representations to the effect that there was trouble in the company in California over the issue of stock; that he had it in his power to get his friends out, and that he wanted the plaintiff to sell his stock to him, so that he could save him from being annoyed with the troubles of the company, etc.

But the action is not based upon a fraud, and could hardly be sustained if it had been, for, under the liberal provisions of the contract alleged, the plaintiff was given ample time in which to investigate the facts in relation to the condition of the company and the value of the stock, and then, if dissatisfied, to rescind and annul the sale. Much discussion has taken place upon the argument of this case and in the courts below, in reference to the election of the plaintiff to rescind the contract of sale. Under the agreement the plaintiff was given the right to rescind and have the contract canceled "during or after the then contemplated visit to California of William H. Aspinwall." The precise time in which this election was to be made is not stated, but the reference to the time of his visit to California as a time in which the election could be made, would seem to indicate that it was the contemplation of the parties that it should be speedily made after he had had an opportunity to investigate the affairs of the company and

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determine as to the value of its stock, and it was doubtless his duty to exercise his option within a reasonable time thereafter. This action was not brought until nearly six years thereafter, and consequently the election to rescind, if made, must have been made long before its commencement, in order to be within the reasonable time allowed. We are, however, not left in doubt as to the facts bearing upon this question, or even as to whether there was an election by the plaintiff to rescind. That he did so rescind is alleged in the complaint, and is testified to by him, and it is not controverted by the defendant. The plaintiff says he received a telegram from Aspinwall, while he was still in California, in which it was stated that they had made a mistake in selling the stock, and that thereupon he immediately went to Huntington, offered to pay back the money received, and demanded the return of the stock. The defendant neglected and refused to return it, and by so doing, committed a breach of the agreement. Whilst the election of the plaintiff was complete and made within the time allowed, it is claimed that he is not bound thereby for the reason that the defendant refused to surrender the stock, and thereby violated his agreement, and that he cannot be permitted to avail himself of his own misconduct in order to hold the plaintiff to his election. We shall assume this to be so, for the purposes of this case, without stopping to consider or decide the question, for under the view entertained by us, it is not essential in the determination of the case.

Upon the trial the case proceeded upon both claims, and evidence was taken upon each cause of action alleged until the plaintiff rested, at which time the defendant called upon him to elect as to which cause of action he would rely upon. This the plaintiff objected to doing, and thereupon the court ruled and required him to make such election, whereupon, after first taking an exception to such ruling, he elected to rely upon his claim for the higher price alleged to have been paid to others by the defendant for stock of the company. Of this ruling complaint is now made, and in order for us to

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determine whether or not the plaintiff has suffered in consequence thereof, it becomes important for us to first ascertain the precise nature of the causes of action alleged in the complaint.

As we have seen, it is first alleged that it was agreed between the parties that in case any person or party other than the plaintiff had been or should be paid by or for account of the defendants or either or any of them, any higher price per share for any shares of the stock than the price paid to the plaintiff, then, and in that case, the defendants would pay to the plaintiff such additional sum. This allegation in effect makes the additional sum so agreed to be paid, if paid to others, a part of the purchase-price, and the action, therefore, would be upon the contract of sale for the balance of the purchase-money due and unpaid. It would be an action in affirmance of the contract.

The other allegation is to the effect that it, during or after the contemplated visit to California of Aspinwall, the plaintiff should become dissatisfied with such sale, the defendants would, upon demand, return to him the stock so sold, and would consent to the cancellation and rescission of the sale. That he did become dissatisfied during the visit of Aspinwall to California, and did demand of the defendants a return of the stock, and that the sale be rescinded, etc., and the defendants refused to return to him the stock or consent that the sale be canceled or rescinded.

The action under this clause of the complaint would have to proceed upon the theory that the contract had been rescinded and annulled, and the recovery would have to be for the value of the stock. It is said that the action would be upon a breach of the contract by the defendant. Very true, but what was the breach? It was a refusal to return the stock to the plaintiff when he exercised the option given him by the contract to rescind.

The appellant says, however, that he makes no claim upon the ground of conversion; that his claim is founded upon a breach of the contract in not returning the stock when

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demand, and that because of that breach he is entitled to recover the fullest damages which, by the proofs, he could establish. That if the price paid to other parties exceeded the value of the stock he would be entitled to recover that amount.

We cannot recognize or approve of such a claim. If the plaintiff is entitled to recover on account of a higher price paid to others, it is because there is such a provision in the contract, and the action is maintained thereon to recover the balance due as a part of the purchase-price, and not because of a breach of the contract in refusing to return the stock. If he is entitled to recover because of such breach, it must be for the value of the stock as established by the evidence.

It has also been said that the agreement was in effect that the plaintiff should have the right to buy back or repurchase the stock instead of rescinding and annulling the sale. But we find no such allegation in the complaint, or any support thereof in the evidence. It consequently appears to us that one cause of action is for the value of the stock based upon a rescission of the contract, whilst the other is for a balance of the purchase-price based upon an affirmation of the contract. If this is so the two causes are inconsistent, and he could not be permitted to go to the jury upon both.

The appellant concedes that the contract contains two separate, distinct provisions of such a nature that the performance of either would discharge and satisfy the whole contract, and yet he asks to go to the jury upon both. In case half of the jurors should be of the opinion that he was entitled to recover the value of the stock by reason of the rescission of the contract, and the other half should be of the opinion that he was entitled to recover for balance of purchase-price because of paying a higher price to others, there would still be a verdict in his favor. A bare statement of the facts demonstrates the wisdom of the rule that prohibits a party from going to the jury upon inconsistent claims.

One of the judges below, in his opinion, says that that court, on a former review of the case in the General Term, said that it was then held that the plaintiff's action was limited to the

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right to recover damages for the refusal to return the stock, and that there was consequently no reason for the trial court in this case to require an election as to the cause upon which the plaintiff would place his right to recover after he had been so restricted by the decision of the General Term. We do not, however, understand that any such restriction was made by the General Term on that review. No evidence thereof appears in the case other than is disclosed from the opinions of the judges written upon that review.

In the chief opinion written in the case the position was taken that the plaintiff had elected to rescind the sale, that he was bound by it, and consequently could not maintain an action upon the contract for the higher price paid to others. This view, however, was not concurred in. Another judge, favoring a reversal upon the ground that the evidence upon which the plaintiff had recovered damages, failed to support the verdict. The other member of the court concurred in the result, specifying no ground, so that we do not understand that it was then determined that the election of the plaintiff was final and binding upon him, and that the defendant could avail himself thereof. The one question upon which the judges writing in that case did agree was that the evidence was insufficient to sustain the verdict, which was based upon the contract for the higher price paid to others. But the agreeing upon this point did not authorize that court in granting a new trial to limit or restrict the plaintiff to his other cause of action. He had the right to bring other witnesses to produce evidence which would sustain a verdict by showing other sales at a higher price to other parties.

It is said that the court should have restricted the plaintiff to his claim for damages by reason of the refusal of the defendant to return the stock. In other words, that the trial court should have elected for the plaintiff as to which cause of action he should proceed upon. We do not understand, however, that such a duty devolves upon the court, or could properly be exercised by it. The right to elect rests with the party, and cannot be taken from him.

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That the causes of action are inconsistent, and that an election should be made, has been held upon each trial of the action, and we think the same has been properly approved of by the General Term.

It remains to be seen whether there is any evidence that the defendant had paid others a higher price for the stock than that paid to the plaintiff. The evidence relied upon to sustain this branch of the case pertains to the transactions of the Contract and Finance Company, of which the defendants were the principal stockholders, which company had been incorporated under the laws of California, for the construction of the Central Pacific railroad. It appears that one Lombard, who was the owner and had control of a block of the stock, commenced or was about to commence an action against the Contract and Finance Company, the defendants individually, and others; that one John B. Felton was his attorney; that he had prepared the complaint in the action and showed it to the president of the corporation, in which complaint he had alleged numerous appropriations of money belonging to the Central Pacific Railroad Company by the officers of the Contract and Finance Company, amounting to upwards of fifty millions of dollars. The relief prayed for in part was, that a receiver be appointed of the Central Pacific Railroad Company and of the branches thereof, that the defendants be restrained and enjoined from acting as members of the board of directors of that company, or from voting at any meeting of stockholders upon any of its stock; and that they also be restrained and enjoined from selling, transferring, pledging or otherwise disposing of any of the stock of the said company, etc.; that an accounting be had of the actual cost of the building and equipment of the Central Pacific railroad and of the telegraph line, and of the receipts and income thereof from the time the same commenced running to the time of the appointment of the receiver; that an account also be taken of the disposition of all of the stock and bonds of the company, of the bonds issued by the United States in aid of such company, of bonds issued by the city and county of San Francisco and other municipali-

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ties, of moneys received from the state of California, from private subscription, from the sale of lands and all other sources; and that they be adjudged to surrender to the Central Pacific Railroad Company all the bonds of the United States and of the said Central Pacific Company, and all of the stock of the said company held by them or either of them; that they be adjudged to pay into the treasury of the company the sum of fifty millions of dollars, and for such other and further relief as shall be equitable. It also appears that at this time the defendants were endeavoring to reorganize the railroad company and to negotiate the sale of a large amount of the stock; that they feared that the bringing of the suit would impair the credit of the company and interfere with their contemplated reorganization; that thereupon negotiations were had for a settlement, which finally resulted in the Contract and Finance Company paying to Felton, the attorney, the sum of ninety thousand dollars, and to Lombard the sum of one hundred and ninety thousand dollars, Lombard transferring his stock to the Contract and Finance Company, and Felton agreeing that he would not bring any other like action against the defendants. It also appears that about a month thereafter another action of the same character, with similar allegations, was brought by one Brannan, who was the owner of two hundred shares of the stock of the Central Pacific Company, and that this action was also finally settled by the Contract and Finance Company by its taking a transfer of the stock and paying the sum of eighty-five thousand dollars. In the settlement made, there does not appear to have been anything said in reference to the amount that should be allowed or paid for the stock; in each case a gross sum was agreed upon to be paid in settlement of the action, which embraced a transfer of the stock to the Contract and Finance Company. Stanford the president of the company, in his testimony, states that he regarded the suits as an attempt to blackmail; that he believed the parties were aware that they were negotiating for a large amount of money, and that they thought, under the circumstances, that they could interfere with the negotiations. But, whether the

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actions were for blackmail or not, it does not change the facts in reference to the settlements, and it is quite evident, from the undisputed evidence upon the subject, that the defendants, through the Contract and Finance Company, were induced to pay a large sum in settlement of these cases, in order to prevent the publicity and consequent effects which would of necessity follow upon a contest over the allegations contained in the complaint and of the relief demanded thereon.

The contract, as we have seen, was, that if the defendants should pay any other person a higher price for the stock than was paid the plaintiff, that then they should pay the plaintiff the difference between the amount which he had already received and the higher amount so paid to other persons. This contract contemplates the voluntary purchase of stock by the defendants and not the amounts paid in the compromise of actions of the character described ; and, consequently, the evidence in reference to such settlements furnishes no basis upon which a verdict for the plaintiff could have been rendered.

The witness Aspinwall gave evidence to the effect that the defendant Huntington had stated to him that they had paid four hundred dollars a share for the stock, but it also sufficiently appears that at the time this statement was made, Huntington was speaking of the compromise of the actions to which we have already referred, and it consequently can have no other effect than that given to the settlements of those cases.

These views render it unnecessary to consider the other questions involved in the case.

The judgment should be affirmed, with costs.

All concur, except VANN, J., dissenting.

Judgment affirmed.

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ALICE WINANS, Appellant, v Ross R. WINANS, Respondent.

An application for leave to discontinue an action is addressed to the legal, not the arbitrary discretion of the court, and it may not be denied capriciously, but may be refused whenever circumstances exist which afford a basis for the exercise of legal discretion; in such a case the court has but to consider whether anything has occurred since the commencement of the action which would so far prejudice defendant's interest, in the event of a discontinuance, as to require a denial of the application. The rule which governs in ordinary cases is not to be strictly applied in actions for divorce; the rights of the parties to the record are not alone to be considered; the public is to be regarded as a party and must be so treated by the court, and for this reason the court is invested with a wider discretion in the control of such cases than of others.

In an action for divorce, an order of reference was entered by consent of the court on stipulation of the parties. After one hearing before the referee, plaintiff moved to vacate the order, and to have the issue sent to a jury; this motion was denied. *Held*, that as plaintiff had waived her right of trial by jury, the motion was not a demand of a right, but a petition for a favor; and so, it presented a matter in the discretion of the court, the exercise of which was not reviewable here.

The plaintiff afterwards moved for leave to discontinue the action without payment of costs or allowance, or on such terms as the court might decree. The alleged contract of marriage was denied by defendant; it was not claimed by plaintiff that any marriage ceremony was ever performed, and, according to her evidence, the contract rested in parol, and was made when no witnesses were present. It appeared that some years before the commencement of this action and on the eve of defendant's marriage to another, plaintiff sought and succeeded in obtaining redress for an alleged injury not consistent with a claim of marriage; that defendant married and lived with another woman in the open relation of husband and wife for several years until her death; he thereafter married another woman, who was designated in the complaint as co-respondent, by whom he had, prior to the commencement of this action, one child. The motion was denied. *Held*, that the matter was within the discretion of the court, and so, not reviewable here.

Reported below, 22 J. & S. 541.

(Argued December 10, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made

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May 2, 1887, which affirmed a judgment in favor of defendant entered upon the report of a referee and affirmed an order of Special Term denying a motion for leave to discontinue the action without payment of costs or allowance, or on such terms as the court should impose.

The nature of the action and the facts, so far as material, are stated in the opinion.

Frederick W. Sherman for appellant. With respect to the motion to discontinue the action plaintiff has waived nothing by proceeding before the referee as she was compelled to do. (*Brown v. Mayor, etc.*, 9 Hun, 591; *In re N. Y. C. & H. R. R. R. Co.*, 60 N. Y. 116.) Plaintiff's motion should have been granted. (*Cook v. Beach*, 25 How. Pr. 359; *Bishop v. Bishop*, 7 Robt. 197; *Cummins v. Bennett*, 8 Paige, 79; *Simpson v. Brewster*, 9 id. 246; *Baraute v. Deyermant*, 41 N. Y. 357; *Harrington v. Libby*, 6 Daly, 261; *Innes v. Lansing*, 7 Paige, 585; *Carleton v. Darcy*, 75 N. Y. 377; *In re Butler*, 101 id. 307.) This was a proper case to grant leave to discontinue. (*Arnoux v. Steinbrenner*, 1 Paige, 82; *Phœnix v. Hill*, 3 Johns. 249; *Cook v. Beach*, 25 How. Pr. 359; *Cummins v. Bennett*, 8 Paige, 79; *Simpson v. Brewster*, 9 id. 246.) The exceptions to the questions assuming the very first fact in issue, to wit: That the marriage between the plaintiff and defendant had not taken place, were well taken. (*Foot v. Beecher*, 78 N. Y. 115; *Chandlers v. Allen*, 20 Hun, 424; *Smith v. Smith*, 1 T. & C. 63; *Williams v. Fitch*, 18 N. Y. 546; *Bayliss' Tr. Pr.* 499; *Holcomb v. Holcomb*, 20 Hun, 159; *Bond v. Gillett*, 47 N. Y. 186; *Osgood v. M. Co.*, 3 Conn. 612.) In consequence of what defendant told him, defendant's brother recognized plaintiff as one of the family, and spoke of her reception as a daughter in that family by the head of it. This comment was stricken out, and plaintiff excepted, and there was also stricken out with it the evidence that defendant had called her his wife while on the steamer "Scotia." This was error. (*Morrill v. Foster*, 33 N. H. 386; *A. L. Ins. Co. v. Rosenagle*, 77 Penn. St. 516; 1 Greenl. on

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Ev. § 104; 1 Phillips on Ev. 213, 248; Reynolds on Ev. 51, 54; Stev. on Ev. § 53; Best on Ev. 498; *Clark v. Owens*, 18 N. Y. 434; Stephen's Dig. of Ev. [Chase's ed.] art. 31, p. 73; *Walchton v. Tuttle*, 4 N. H. 378; *Haddock v. B. & M. R. R. Co.*, 3 Allen, 298.)

James C. Carter for respondent. The order vacating the reference is not before the court at all. There is no appeal actually taken which brings it here. If it were here it would be to no purpose, for it is not, in its nature, reviewable by this court. It does not affect a substantial right, and it plainly rests in discretion. (Code Civ. Pro. § 190.) The plaintiff relies in her effort to reverse the judgment on the denial of what she asserts to have been her absolute right to discontinue her suit. There is no such right. A discontinuance rests in the sound discretion of the court. (*Carlton v. Darcy*, 75 N. Y. 375; *In re W. W. Works*, 85 id. 478; *Van Allen v. Schermerhorn*, 14 How. Pr. 287; *Cockle v. Underwood*, 3 Duer, 676; *Crosby v. Fitzpatrick*, 23 Wkly. Dig. 35; *In re Butler*, 101 N. Y. 307; *Murphy v. Murphy*, 8 Phil. 357.)

PARKER, J. The complaint averred that the parties intermarried on or about the 31st day of May, 1871, at the city of New York; that subsequently the defendant committed adultery, and demanded judgment that the bonds of matrimony between them be dissolved and plaintiff be awarded alimony and costs of the action. The answer put in issue both the averments of marriage and adultery.

Subsequently, issues were duly prepared and settled for trial by jury, but before the cause was reached upon the calendar, the parties stipulated that it be referred. The court, approving of such action, designated by order a referee to hear and determine the issues.

The referee, after the evidence was submitted, found as facts: 1. "That the plaintiff was not, on the 31st day of May, 1871, or at any other time, at the city of New York or elsewhere, married to the defendant." 2. "That the plaintiff did not, at the time and place stated in the complaint, or at any

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other time and place, commit adultery with the person named in the complaint," and, as a conclusion of law, "that defendant is entitled to judgment against the plaintiff; that the complaint be dismissed upon the merits, with costs."

The General Term affirmed the judgment entered thereon, and the findings, therefore, are not subject to review in this court, inasmuch as they were supported by evidence.

The appellant has called our attention to several exceptions taken to rulings of the referee in the admission and rejection of testimony. We have given to each of them careful consideration, and have determined that no error was committed justifying a reversal.

Two other questions are pressed upon our attention which we shall now consider :

1. After one hearing before the referee, at which the plaintiff was partially examined, a motion was made in her behalf to vacate the order of reference, to the making of which she had originally consented, and send the case to the jury. This motion was denied, and if it be assumed that plaintiff's appeal brings up the order entered thereon, it cannot avail her here. It did not affect a substantial right. Once she had the right to demand a trial by jury, but that right was gone before the making of the motion, at the instance of her counsel and by her own consent. She was not, therefore, before the court demanding a right, but petitioning for a favor — praying to have restored to her that which she had waived, because at the time she regarded it beneficial to her interests to do so.

The court, in the exercise of its discretion, refused to relieve her from the consequences of her own act, and such refusal, under the circumstances disclosed, will not be reviewed by this court.

2. After the making of the motion to vacate the order of reference, the plaintiff moved the court for leave to discontinue the action without the payment of costs or allowance, or on such terms as the court may decree. The denial of that motion the plaintiff assigns for error. She asserts that while the court had power to impose terms as a condition of discontinuance, it

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was without authority, under the circumstances disclosed by the papers before it, to prevent it. That the absolute right to discontinue resided in the plaintiff, the court being merely vested with the discretion to determine what, if any, terms should be imposed, and that this right may be made available at any stage of the action, even after trial is actually begun.

Carleton v. Darcy (75 N. Y. 375), was an action of ejectment. The plaintiff recovered judgment, and was put in possession of the premises; defendant paid the costs and took a new trial under the statute; thereupon plaintiff, still retaining possession, moved for leave to discontinue on payment of costs. The motion was denied, and on appeal this court said: "That court has refused his request, and on appeal from the order he claims that he has the right, of his own head, to discontinue his action on those terms. But there is no valid discontinuance of an action without an order to that end. That order, whether *ex parte* or on motion, must be an order of the court, and, as its order, within its control. It is true, as a general rule, that a plaintiff may, upon the payment of the costs of the defendant, enter an order of discontinuance of the action, and give notice thereof, and that the cause will be thereby discontinued. Yet the court has always kept and exercised the right to control such an order, as well as any other order put upon its records. And where circumstances have existed which have made it inequitable that the plaintiff should, of his own head and without terms, discontinue his action, they have refused his motion to do so altogether, or except on terms; or when he has entered an order *ex parte*, have opened it, and made it conform to what was proper under the circumstances. * * * So that the court, to which the motion for leave to discontinue was addressed, had a discretion, under all the circumstances of the case, whether or not to refuse it." The rule thus enunciated has been frequently alluded to and applied by the courts. (*Carleton v. Darcy*, 75 N. Y. 375; *Matter of Waverly Water Works Co.*, 85 id. 478; *Van Alen v. Schermerhorn*, 14 How. Pr. 287; *Cockle v. Underwood*, 3 Duer, 676; *Crosby v. Fitzpatrick*, 23 Weekly Dig. 35.)

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But an application for leave to discontinue is addressed to the legal, not the arbitrary, discretion of the court, and it cannot capriciously deny it. This court in the *Matter of the Petition of Butler* (101 N. Y. 307), reversed an order denying leave to discontinue upon the ground that the facts before the court did not furnish a basis upon which to rest a denial of the application. FINCH, J., in delivering the opinion of the court, said: "In such a case, through the control which the court exercises over the entry of its order, there is discretion to refuse; but where there are no such facts, and nothing appears to show a violation of the right or interest of the adverse party, the plaintiff may discontinue, and a refusal of leave becomes merely arbitrary and without any basis upon which discretion can exist."

The cases cited support the right to refuse leave whenever circumstances exist which afford a basis for the exercise of legal discretion, and in those cases the court had but to consider whether anything had occurred since the commencement of the action which would so far prejudice defendant's interest in the event of a discontinuance as to require a denial. But in divorce cases there are two reasons why the rule which guides the court in determining whether to allow a discontinuance in ordinary actions cannot be strictly applied.

1. The rights of the party to the record are not alone to be considered, the public is regarded as a party and must be treated as such by the court.

2. Because of the public interest the court has been invested with a wider discretion in the control of the course of procedure in matrimonial actions than in others.

Such an action is one of the few in which a court is authorized to exclude the public from the trial.

In all actions save such as are enumerated in section 1012 of the Code of Civil Procedure the parties may, by written stipulation, signed by their attorneys, select a referee to hear and determine the issues; but in an action to annul a marriage, or for a divorce or a separation, a reference shall not be made of course upon the consent of the parties. Although the parties

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consent, the court may, in its discretion, refuse a reference. If it grant a reference the parties may not select the referee. The court must designate him. So in actions generally where upon the court devolves the duty of appointing a referee, no person can be appointed to whom all the parties object, but in an action to annul a marriage, or for a divorce or a separation, it may be done. (§ 1024.) So too, where a party may ordinarily, by admitting the allegations of the complaint, relieve the plaintiff from the necessity of making proof thereof, such is not its effect in actions for divorce. A decree cannot be based on consent. And it is the duty of the court to be zealous in the prevention of all collusive divorces — to thwart any effort of the parties to sunder the marriage contract, save for the reasons which the statute prescribes shall be permitted to so operate as to release the innocent from bonds which continue to fetter the guilty. Consequently it cannot be concluded by the stipulations and consent of the parties as to the merits. Proof of the facts which authorize a decree will alone suffice. The instances given are sufficient to call attention to the fact that record parties are not permitted that degree of control in matrimonial actions which they may exercise over suits generally. While on the other hand, courts are required to exercise a broader discretion in their conduct. The reason for the difference is found in the interest which the public has in any consummated contract of marriage. Because of that interest the public is treated as a party to the controversy, although, of course, not a party to the record.

In Bishop on Marriage & D. (vol. 2, § 230), the attitude of the public towards such a litigation is stated as follows: "A divorce suit, while on its face a mere controversy between private parties of record, is as truly viewed, a triangular proceeding *sui generis*, wherein the public or government occupies in effect the position of third party." And while this third party is not specially represented by counsel, it is for this purpose to be represented and protected by the judges. (*Murphy v. Murphy*, 8 Phil. 357.) This third party, so called, had an interest in the prompt prosecution of the action, which the

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court should have, and we must assume did, regard in its determination.

This was not a case where the contract of marriage was admitted, leaving simply the issue of adultery. The marriage was denied. No ceremony was ever performed. No witnesses were present at the making of the alleged contract, but according to the evidence of the plaintiff it rested in parol. It appeared that the person seeking to have this contract established, years before the commencement of the action and on the eve of defendant's marriage to a woman since dead, with knowledge of such fact, accompanied by her mother, sought and obtained the assistance of a lawyer to secure for her redress and indemnity for an alleged injury, which, if well founded, was not consistent with the assertion of marriage. Their petition appears to have prospered to a degree which for the time being gave entire satisfaction. Shortly thereafter, the defendant married another woman and lived with her in the open relation of husband and wife for several years and until her death. The plaintiff, in the meantime, was by a ceremonial marriage united to another man, and they lived together for a period of five years. It is true that the plaintiff's testimony, and it was before the court on the hearing of this motion, tended to explain the apparent inconsistency between her present claim and the fact of marriage to another long after the alleged contract with defendant was entered into. She assigned as a reason the mistaken counsel of a lawyer, which led her to believe that she was not legally married to the defendant.

Now, the defendant, after the death of the woman whom by ceremony and subsequent conduct he held out to the public as his wife, with every form of solemnity married another woman, by whom he had, prior to the commencement of this action, one child. She was designated in the complaint as co-respondent. The issue then involved in its result a determination whether the mother was a wife and the child legitimate. In the prompt disposition of that question the public was interested. Its duty is to see that all contracts shall be

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fulfilled beneficially to progeny who are to be enrolled amongst the citizens of the state, and it owed the mother the duty to have determined as speedily as the due administration of justice would permit, whether she was wife in fact or only in name. And the court having regard, as was its duty, for the interests of the public, determined that the plaintiff ought not to be allowed to discontinue. The situation presented admitted and required the exercise of discretion. Therefore we need not further consider the matter.

The judgment should be affirmed.

All concur.

Judgment affirmed.

124	148
155	486

ELLSWORTH TUTHILL et al., Respondents, v. WILLIAM H. SKIDMORE et al., Appellants.

Where one engaged in commerce permits his commercial paper to be dishonored and his property to be attached in an action in which judgment is subsequently recovered by default, this is evidence, and if unexplained is proof of insolvency.

When the price of goods sold on credit is due and unpaid, and the vendee becomes insolvent before obtaining possession, the vendor has the right to retain possession of the property as security for the purchase-price, as against the vendee or his attaching creditor, which right is greater than a lien.

In an action of replevin to recover possession of property sold by plaintiffs to one L., but left in plaintiffs' possession until after notes given for the purchase became due and were dishonored, and which had been levied upon by defendants by virtue of an attachment against L., plaintiffs alleged title to the property, and, also, that they "had a special property therein, to wit: A lien for unpaid purchase-money." The defendants' answer denied specifically both of these allegations. No motion was made to make the complaint more definite and certain, and it affirmatively appeared that defendants were neither harmed nor misled by the omission to set forth "the facts upon which the special property depends," as required by the Code of Civil Procedure (§ 1720). *Held*, that the defect was not such as would require a reversal of the judgment.

At the beginning of the trial defendants moved that plaintiffs be compelled to elect whether they would seek to recover on the ground of ownership or of a lien for unpaid purchase-money. The court decided to first hear the evidence, and defendants excepted. At the close of

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plaintiffs' case, defendants offering no evidence, both parties asked the court to direct a verdict. *Held*, that as it did not appear defendants were harmed by the ruling of the court, it was not a ground of review; that as the two inconsistent claims appeared in the complaint, defendants should, before answering, have moved that plaintiffs be compelled to elect.

Also *held*, that plaintiffs, by alleging and asserting on the trial absolute ownership, and also a special interest or lien, did not thereby waive their special interest or lien, as the inconsistency between the two claims arose not from the facts, but related wholly to the legal conclusions to be drawn from conceded facts.

Hudson v. Swan (88 N. Y. 552), distinguished.

Where a complaint sets forth two inconsistent causes of action, and the defendant waits until the trial and then moves that plaintiff be compelled to elect between them, the court may decline to decide the motion until part or all of the evidence is taken, and a denial of the motion is so far discretionary that it will not be reviewed when it appears that defendant was not harmed.

(Argued December 11, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 14, 1888, which affirmed a judgment in favor of plaintiffs entered upon a verdict directed by the court, and affirmed an order denying a motion for a new trial.

This was an action of replevin.

On September 11, 1886, the plaintiffs, under their firm name of Ellsworth Tuthill & Co., and Walter E. Lawton, doing business under the name of Lawton Brothers, entered into the following written contract:

“September 11, 1886.

“Sold for account of Messrs. Ellsworth Tuthill & Co. to Messrs. Lawton Brothers, New York, five hundred tons sellers' usual good make platform-dried fish scrap, not treated with acids, of this season's make, to be ready for delivery before close of sellers' works, at \$28 per ton of 2,000 lbs., actual weight in bulk, F. O. B. sellers' factory, Promised Land, Long Island. Terms, payment by buyer's notes at four months, with interest, added at a rate of six per cent per annum from date of delivery on presentation, bills of lading,

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invoice, weigher's return, and Stillwell & Gladding's certificate of moisture. If scrap removed before closing sellers' factory this fall, or, if scrap is not removed before such time, buyers are to give their notes, bearing same interest for an approximate amount, bearing date of such closing. Buyers to have privilege of leaving scrap at their own risk, free of charge for storage, till opening of fishing season of spring, 1887, provided if they require any scrap between such closing and opening, buyers are to pay thirty-five cents per ton for loading. Scrap guaranteed not to exceed twelve per cent. moisture, Stillwell & Gladding's analysis from samples drawn in the usual way. Scraps to be in good order and condition."

From the date of this contract to the date of the trial of this action (October 25, 1887), the plaintiffs at all times had on hand at their factory at Promised Land, L. I., more than 500 tons of fish scrap of the kind and quality mentioned in the contract, but the quantity sold nor any part of it was ever set apart for the vendee. November 12, 1886, the vendee gave the vendors, towards the purchase-price, three promissory notes signed by the purchaser and payable to the order of the sellers, of the dates, for the amounts and due as follows:

Date.	Amount.	Time.	Due.
Nov. 12, 1886...	\$5,000...	Four months...	March 15, 1887.
Nov. 19, 1886...	\$5,000...	Four months...	March 22, 1887.
Nov. 26, 1886...	\$3,000...	Four months...	March 29, 1887.

The purchase-price was \$14,000 and after deducting these notes \$1,000 remained, which was never paid nor was a note given for it. These notes were all dishonored and have never been paid, nor has any part of the purchase-price of the property. About the 1st of December, 1886, the plaintiffs sent the purchaser the following receipt:

"ELLSWORTH TUTHILL & Co., Manufacturers of

"Menhaden Oil and Guano, Factory at Promised Land, L. I.

"PROMISED LAND, N. Y., Nov. 12, 1886.

"We hereby certify that we hold five hundred (500) tons of platform dried fish scrap, of good quality and in good condi-

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tion, in bulk, subject to the order of Mess. Lawton Bros., in our factory at Promised Land, Long Island, Suffolk county, N. Y., as per terms of contract.

“ELLSWORTH TUTHILL & CO.

“Dated *September 11th.*”

March 24, 1887, Joseph L. Morton began an action in the Supreme Court against Walter E. Lawton for the recovery of money, in which an attachment was issued, by virtue whereof, March 28, 1887, the defendant Skidmore, as sheriff, and the defendant Hand, as his deputy, levied upon and seized 500 tons of fish scrap then stored at the plaintiff's factory. The quantity attached was not separated from a larger quantity of which it was a part, and was never removed from the plaintiffs' premises. June 15, 1887, Morton recovered a judgment against Lawton in that action for \$22,629.66, which was entered in the office of the clerk of the city and county of New York, a transcript of which was duly filed and the judgment duly docketed June 27, 1887, in the office of the clerk of the county of Suffolk. May 13, 1887, the plaintiffs demanded of the defendants that they release the attachment and surrender the property to them, which was refused, and on the next day this action in replevin for the recovery of the property was begun. Upon the trial, each party asked that a verdict be directed in his favor, neither claiming that there was any question of fact for the jury. A verdict was directed for the plaintiffs.

Abram Kling for appellant. The plaintiffs cannot recover in this action on the allegation in their complaint that Lawton wrongfully took the chattels from said plaintiffs, as the evidence established that said property came lawfully in the possession of said Lawton by reason of the sale to him by said plaintiffs. (*Olyphant v. Baker*, 5 Den. 379; *Williamson v. Berry*, 8 How. [U. S.] 544; *Bradley v. Wheeler*, 44 N. Y. 495; *Sanders v. Waterbury*, 116 id. 371; *Benjamin on Sales*, § 315; *Barrett v. Goddert*, 3 Mason, 107; *Terry v. Wheeler*, 25 N. Y. 520; *Kimberly v. Patchen*, 19 id. 330; *Russell v. Carrington*, 42 id. 125; *Crofoot v. Bennett*, 2 id. 258; *Bur-*

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rows v. Whitaker, 71 id. 291.) As the plaintiffs cannot maintain their action on the ground that the chattel was wrongfully taken, but only upon the theory of the wrongful detention of the said property, the facts and circumstances showing how such detention was wrongful must be set forth in the complaint, which was not done, so the exception to the admission of evidence and the refusal to dismiss the complaint on this ground was error. (Code Civ. Pro. § 1721; 5 Wait's Act. & Def. 456; *Curtis v. Jones*, 3 Den. 590; *Patterson v. Adams*, 7 Hill, 126.) The plaintiffs cannot recover upon the complaint in this action in which they claim title as owners, and not by virtue of a lien for unpaid purchase-money, as the claim of ownership was inconsistent with that of a lien, and no cause of action on the latter ground is set forth in the complaint. (*Hudson v. Swann*, 83 N. Y. 552; *Mixal v. Dearborn*, 12 Gray, 336; *Saltus v. Everett*, 20 Wend. 268; *Hackswell v. Farnam*, 7 How. Pr. 236.) The plaintiffs must allege, as well as prove, the facts constituting his cause of action, and a recovery upon a cause of action not alleged in the complaint, although proved under exception and objection upon the trial, is not sustainable. (*Clark v. Post*, 113 N. Y. 18.) The plaintiffs could in no event have maintained this action on the ground of lien, or special property in the chattels, by virtue of unpaid purchase-money, as they have failed to establish the insolvency of Lawton when his credit expired. (*Riddle v. Varnum*, 20 Pick. 280; *McEwen v. Smith*, 2 H. L. Cas. 309; *Durgy v. O'Brien*, 123 Mass. 12; 5 Wait's Act. & Def. 614; *Nichols v. Micheals*, 23 N. Y. 264.)

Thomas Young for respondents. If the legal title to the scrap in question passed from the plaintiffs to Walter E. Lawton the respondents have a lien thereon for the purchase-money. (Story on Sales, §§ 285, 286; 1 Pars. on Cont. [5th ed.] 526; *Bloxam v. Sanders*, 4 B. C. 941; Bump on Bankruptcy, 683; Benjamin on Sales, 819; *Brown v. Montgomery*, 20 N. Y. 287, 291; *Brower v. Harbeck*, 9 id. 594.) The giving of the paper above mentioned of November 12, 1886,

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can hardly be regarded as a symbolical delivery of the goods. (Story on Sales, §§ 287, 288, 339; Benjamin on Sales, § 823.) There is room for question, whether title passed to Lawton as the effect of what transpired between him and plaintiffs. If title did not pass, then plaintiffs, as owners of the goods, have a right to hold them against Lawton and his creditors. (*Kein v. Tupper*, 52 N. Y. 550; *Footte v. Marsh*, 51 id. 288; *Stephens v. Santee*, 49 id. 35; *Stone v. Browning*, 68 id. 598; *Anderson v. Reed*, 106 id. 333.) The court ruled correctly in not requiring plaintiffs to elect, and go upon either lien alone or title alone, as asked on the trial by the defendants. (Code Civ. Pro. §§ 488, 499; *Hudson v. Swan*, 83 N. Y. 552; *Leggett v. Hyde*, 58 id. 272, 275; *Tuthill v. Skidmore*, 15 N. Y. S. R. 892; *Lloyd v. Brewster*, 4 Paige, 540.) The complaint as regards the claim of lien is sufficient. (Code Civ. Pro. §§ 721, 722, 723, 1726; Sedgwick on Dam. [5th ed.] 582; *Brewster v. Silliman*, 38 N. Y. 423; *Rowley v. Gibbs*, 14 Johns. 385.)

FOLLETT, Ch. J. It will be assumed that the title to the property passed to the vendee, which is the most favorable view which can be taken of the case for the defendants.

Permitting commercial paper to be dishonored by one engaged in commerce, and his property to be attached in an action in which judgment is subsequently recovered by default is evidence, and if unexplained is proof of insolvency. (*Brown v. Montgomery*, 20 N. Y. 287; *Booth v. Powers*, 56 id. 22, 32; Abb. Tr. Ev. 616.)

Neither party asserting at the trial that Lawton's solvency was a question of fact for the jury, the court was justified in holding as a question of law that he was insolvent.

When the price of goods sold on credit is due and unpaid, and the vendee becomes insolvent before obtaining possession of them, the vendor's right to the property is often called a lien, but it is greater than a lien. In the absence of an express power the lienor usually cannot transfer the title to the property on which the lien exists by a sale of it to one having

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notice of the extent of his right, but he must proceed by foreclosure. When a vendor rightfully stops goods *in transitu*, or retains them before *transitus* has begun, he can, by a sale made on notice to the vendee, vest a purchaser with a good title. (*Dustan v. McAndrew*, 44 N. Y. 72.) His right is very nearly that of a pledgee, with power to sell at private sale in case of default. (*Bloxam v. Sanders*, 4 B. & C. 941; *Bloxam v. Morley*, 4 id. 951; *Milgate v. Kebble*, 3 M. & G. 100; *Audenreid v. Randall*, 3 Cliff. 99, 106; Black. Sal. [2d ed.] 445, 454, 459; Benj. Sal. [Corbin's ed.] § 1280; Jones' Liens, § 802.) The vendee having become insolvent and refused payment of the notes given for the purchase-price of the property which remained in the vendor's possession, his right to retain it as security for the price was revived as against the vendee and his attaching creditor. (*Arnold v. Delano*, 4 Cush. 33; *Haskell v. Rice*, 11 Gray, 240; *Milliken v. Warren*, 57 Maine, 46; *Clark v. Draper*, 19 N. H. 419; *Bloxam v. Sanders*, 4 B. & C. 941; *Bloxam v. Morley*, Id. 951; *Hamburger v. Rodman*, 9 Daly, 93; Benj. Sal. [Bennett's ed.] § 825; 2 id. [Corbin's ed.] § 1227; Story Sal. § 285; Black. Sal. 454.)

The plaintiffs allege in their complaint that they own the property, and also that they "had a special property therein, to wit: A lien for unpaid purchase-money," both of which allegations the defendants specifically denied. It is now insisted, as it was at the trial by the defendants, that the allegation in respect to the special property is not a compliance with section 1720 of the Code of Civil Procedure, which provides that when "the right of action or defense rests upon a right of possession by virtue of a special property, in which case the pleading must set forth the facts upon which the special property depends so as to show that at the time when the action was commenced or the chattel replevied, as the case may be, the party pleading or the third person who is entitled to the possession of the chattel." The defendants not having moved to make the complaint more definite and certain, and it affirmatively appearing that they were neither harmed nor

misled by the omission to set forth all of the facts out of which the special property arose, the judgment will not be reversed for this defect in the complaint.

When the trial began it was moved in behalf of the defendants that the plaintiffs be compelled to elect whether they would seek to recover on the ground that they owned the property or on the ground that they had a lien thereon for unpaid purchase-money. To this request the court replied "I will hear the evidence first before I compel him to do that." To this remark the defendants excepted. At the close of the plaintiffs' case, the defendants offering no evidence, both parties asked the court to direct a verdict.

The object of requiring plaintiffs to elect between inconsistent causes of action is to simplify the issues of fact so that they may be intelligibly and fairly tried, but it is plain in this case, that the defendants were not misled nor harmed by the refusal of the court to compel an election. The plaintiffs' allegation that they owned the property and their allegation that they had a lien thereon for unpaid purchase-money are inconsistent. (*Hudson v. Swan*, 83 N. Y. 552.) But when, as in the case at bar, the inconsistency plainly appears on the face of the complaint, the defendants should, before answering, move that the plaintiffs be compelled to elect. (*Cassidy v. Daly*, 11 W. Dig. 222.) If in such a case the defendant lies by until the trial and then moves, the court may in its discretion wait until part or all of the evidence is taken before deciding the motion (*Southworth v. Bennett*, 58 N. Y. 659), and its denial is so far discretionary (*Kerr v. Hayes*, 35 N. Y. 331, 336; *People v. Tweed*, 63 id. 194), that it will not be reviewed when it appears that the defendant was not harmed.

It is also urged on the authority of *Hudson v. Swan* (*supra*), and the cases therein cited, that the plaintiffs by alleging in their complaint and asserting at the trial absolute ownership of the property, and also a special interest in or lien upon it, waived their special interest or lien, if any they had, and cannot recover without establishing ownership. In the case cited the facts alleged by the plaintiff to establish ownership were

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inconsistent with those upon which he relied to establish a lien, which is not the fact in the case at bar. As has been shown, the plaintiffs' interest was more than that of mere lienors, and there being no dispute about the facts, the inconsistency relating wholly to the legal conclusions to be drawn from the agreed facts, the case cited is not controlling.

The judgment should be affirmed, with costs.

All concur, except BROWN, J., not sitting.

Judgment affirmed.

JOHN A. K. DUVAL, Appellant, v. HORACE B. WELLMAN,
Respondent.

Although a court of equity will not, as a general rule, lend its aid to either of the parties to an illegal contract, by enforcing its execution or rescinding it, when the parties are not equally guilty, and when the public interest is advanced by allowing the more excusable of the two to sue for relief, the courts will take cognizance of an action for that purpose, and will grant relief by setting aside the contract and restoring the injured party to his original position.

To establish a defense in such an action, it is not sufficient for defendant to show merely that the plaintiff is *particeps criminis*, but it must appear that they were *in pari delicto*, unless the contract be *malum in se*.

In an action to recover back money paid by plaintiff to defendant, who carried on a business known as "a matrimonial bureau," on an agreement by him to procure a husband for her; he to return the money paid on a day named, if at that time she was willing to give up all acquaintance with gentlemen introduced to her by defendant, there was no evidence of actual over-persuasion or undue influence. The court held, as a legal conclusion, that the contract was illegal, and that the parties to it were equal in guilt, and directed a verdict for defendant. *Held*, error; that while the contract was illegal, at most the inferences to be drawn from the facts as to the equality of guilt were for the jury.

It seems that the business of promoting marriages is against the policy of the law and public interest, and the courts will aid a party who has patronized such a business by relieving him or her from all contracts made, and will grant restitution of any money paid or property transferred.

It seems also that contracts by one party to procure, for a consideration, a husband or wife for the other, are considered as fraudulent in their character, and the party paying the consideration will be regarded as under a species of imposition or undue influence.

{Argued December 12, 1890; decided January 14, 1891.}

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APPEAL from order of the General Term of the Court of Common Pleas for the city of New York, made May 4, 1888, which reversed an order of the General Term of the City Court, which reversed an order of the Special Term of said court denying a motion for a new trial.

This action was brought to recover back moneys paid by plaintiff's assignor to defendant upon contracts set forth in the opinion, in which the material facts are also stated.

Wm. H. Mundy for appellant. The contract is void as against public policy, but the parties are not *in pari delicto*, and the money paid thereunder can be recovered. (*Smith v. Bruning*, 2 Vern. 392; 1 id. 89, 90; *Boynton v. Hubbard*, 7 Mass. 118; *Goldsmith v. Bruning*, 1 Eq. Ab. 89; 1 Fonblanque's Eq. chap. 4, § 1; 1 Story's Eq. Juris. §§ 261, 262, 263, 268; *Crawford v. Russell*, 62 Barb. 93; *Marx v. McGlynn*, 88 N. Y. 357.)

R. W. Newhall for respondent. Plaintiff and defendant being *in pari delicto*, no action can be maintained by one against the other. (2 Kent's Comm. 591; 57 N. Y. 528.) Money paid by one party in furtherance of a contract in violation of law, or of public policy, cannot be recovered back where both parties are *in pari delicto*. Courts will not interfere to relieve a participant in an illegal transaction. (*Pepper v. Haight*, 20 Barb. 429; *Otis v. Harrison*, 36 id. 210; *Pease v. Walsch*, 7 J. & S. 514; *Stephs v. Gould*, 9 N. Y. 520; *Schermerhorn v. Talman*, 14 id. 94, 102, 126, 141; *Tracy v. Talmage*, Id. 162, 181; *Mosely v. Mosely*, 15 id. 334; *Knowlton v. E. S. Co.*, 57 id. 518, 528; 17 Hun, 749; Greenl. on Ev. § 111; *Knowlton v. C. E. S. Co.*, 17 Hun, 479.) There is not a particle of evidence of any deceit, fraud, false pretenses, false or misrepresentations by the defendant to induce Mrs. Guion to pay him this \$50, or any money, or even to place her name upon his books, so that she cannot claim a repayment of this money on the ground that she is not *in pari delicto* by reason of any fraud. (*Crawford v. Russell*, 62 Barb. 92; Willard on Eq. Juris. 209-213; *Smith* on Cont. 189, 190; *Schroeppel v. Corning*, 2 Den. 236; *Smith*

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v. *Bromly*, 2 Doug. 670; *Chitty on Cont.* 634, 635; *Addison on Cont.* 235, 236; *Williams v. Hadly*, 8 East, 378; 2 Comyn on Cont. 113, 117, 119; *Howson v. Hancock*, 8 Dumf. & East, 577; *Jacques v. Golightly*, 2 Wm. Black, 1073; *Browning v. Moris*, Cowp. 790; *Mount v. Waite*, 7 Johns. 434; *Smith v. Cuff*, 6 M. & S. 160; *Reynell v. Sprye*, 13 East. 74; *Broom's Leg. Max.* 327; *Story's Eq. Juris.* 300; *Clark v. Shea*, Cowp. 197.) Mrs. Guion did not part with her money without consideration. (*Pellecat v. Angell*, 2 C. M. & R. 311; *Woodworth v. Bennett*, 43 N. Y. 276; *People v. Stephens*, 71 id. 556.) There was no rescission of this contract, or the first part of it, which is directly the subject of this action, neither was the action brought in disaffirmance of it. On the contrary, it is brought in affirmance of it, for it claims exactly what the contract was intended to give. (*Peck v. Burr*, 10 N. Y. 298; *Nellis v. Clark*, 4 Hill, 424; *Woodworth v. Bennett*, 43 N. Y. 273; *Knowlton v. C. & E. S. Co.*, 57 id. 518.)

BROWN, J. The record before us does not contain the pleadings, and we are not informed of the grounds upon which the plaintiff therein based his right to recover. The case has, however, been disposed of in defendant's favor in the court below on the ground that the contract between the parties, upon which the money was paid, was illegal, and that the plaintiff's assignor was *particeps criminis*, and equal in guilt with the defendant.

But whether the cause of action was based upon the contract, or upon the illegality of the contract, and in disaffirmance thereof, does not appear.

The questions discussed in the lower courts have, however, been regarded as of sufficient importance to receive the consideration of this court, and as they were the only ones discussed at our bar, we may confine our observations to them without regard to the particular issue made by the pleadings.

It appears from the evidence that the plaintiff is the assignee of Mrs. E. Guion, a widow lady, who, in her search for a hus-

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band, sought the advice and aid of the defendant, who was the owner and publisher of a matrimonial journal called "The New York Cupid," and the proprietor of a matrimonial bureau in New York city.

Mrs. Guion's testimony was to the effect that in June, 1886, she became a patron of the defendant's establishment, and paid the usual registration fee of five dollars. That she was introduced to thirty or forty gentlemen, but found none whom she was willing to accept as a husband, and that in June, 1887, for the purpose of stimulating the defendant's efforts in her behalf, she paid him fifty dollars, whereupon there was executed the following instrument:

"June 2nd, 1887.

"Due Mrs. Guion from Mr. Wellman fifty dollars (\$50.00), Aug. 15th, if at that time she is willing to give up all acquaintance with gentlemen who were introduced in any manner by H. B. Wellman. If Mrs. Guion marry the gentleman whom we introduce her to, an additional fifty dollars (\$50.00) is due Mr. Wellman from Mrs. Guion.

"(Signed.)

H. B. WELLMAN.

"E. GUION."

In August, 1887, Mrs. Guion, not finding a congenial companion among any of the men to whom she had been introduced and claiming to be willing to give up all acquaintance with them, demanded from defendant the return of the money paid, which, being refused, the claim was assigned to plaintiff and this action was commenced.

The five learned judges who have delivered opinions in the case have agreed that the contract between the parties was void, and this conclusion appears to be amply supported by authority. (1 Story Eq. Jurisprudence, §§ 260-264; 2 Pomeroy Eq. Jurisprudence, § 931; Willard's Eq. Jurisprudence, 211; Bacon's Abridgement, Title Marriage & Divorce, D.; Fonblanque's Eq. Ch. I, § 10; *Boynton v. Hubbard*, 7 Mass. 112; *Crawford v. Russell*, 62 Barb. 92.)

Judge STORY, after discussing the grounds upon which courts of equity interfere in cases of this kind, says: "It is

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now firmly established that all such contracts are utterly void as against public policy * * *," and Chief Justice PARSONS said, in *Boynton v. Hubbard* (*supra*), that "these contracts are void * * * because they have a tendency to cause matrimony to be contracted on mistaken principles and without the advice of friends, and they are relieved against as a general mischief for the sake of the public."

The doctrine that marriage brokerage contracts are void is the outgrowth of the views and opinions of the English people upon the subject of the marriage relation, and the courts of England, for upwards of a century, have universally declared that the natural consequences of such agreements would be to bring about ill-advised, and, in many instances, fraudulent marriages, resulting inevitably in the destruction of the hopes and fortunes of the weaker party, and especially of women, and that every temptation in the exercise of undue influence in procuring a marriage should, therefore, be suppressed. The defendant has, however, succeeded in the lower court upon the application of the rule that a court will not lend its aid to either of the parties to an illegal or fraudulent contract, either by enforcing its execution if it be executory, or by rescinding it if it be executed.

Public policy has dictated the adoption of this rule, but it has its limitations, and when the parties are not equally guilty, or when the public interest is advanced by allowing the more excusable of the two to sue for relief, the courts will aid the injured party by setting aside the contract and restoring him, so far as possible, to his original position. (1 Pomeroy's Equity, § 403; 1 Story's Equity, § 300.)

It is not sufficient for the defendant to show merely that the other contracting party is *particeps criminis*, but it must appear that both are equal in guilt unless the contract be *malum in se*, in which case the maxim *Ex dolo malo non oritur actio* is of universal application.

This subject received very full consideration in the case of *Tracy v. Talmage* (14 N. Y. 162), and it was there said that unless the parties are *in pari delicto* as well as *particeps*

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criminis, the courts, although the contract is illegal, will afford relief to the more innocent party.

Upon the application of this doctrine, in *Mount v. Waite* (7 Johns. Rep. 433), premiums paid for the insurance of lottery tickets were recovered, the plaintiff being held not to be equal in guilt with the defendants.

In *Wheatan v. Hibbard* (20 Johns. Rep. 290) it was held that usurious interest paid by a borrower could be recovered independent of the statute, and that the maxim *inter partes in pari delicto potior est conditio defendantis* did not apply, as the law considered the borrower the victim of the usurer, and Lord MANSFIELD laid down the rule that in transactions prohibited by statute for the protection of one set of men from another set of men the parties are not *in pari delicto*. (*Browning v. Morris*, 2 Cowp. 790. See also *Schroeppel v. Corning*, 6 N. Y. 107-115, 116.)

It will appear from an examination of the authorities upon this subject, a very few only of which are cited, that courts, both of law and equity, have held that two parties may concur in an illegal act without being deemed in all respects *in pari delicto*.

In many such cases relief from the contract will be afforded to the least guilty party when he appears to have acted under circumstances of imposition, hardship, or undue influence, and especially where there is a necessity of supporting public interests, or a well settled policy of the law, whether that policy be declared in the statutes of the state or be the outgrowth of the decisions of the courts.

Accordingly many cases may be cited where relief has been granted from contracts which partook of the character of marriage brokerage agreements. The cases are collected in Pomeroy's Equity Jurisprudence, in a note to section 931; in Fonblanques Eq. (B. I, ch. 4, §§ 10, 11), and Bacon's Abridgment, Title Marg. and Divrs. (541 *et seq.*), and need not be cited here.

In two of the cases referred to, money paid under the contract was recovered back. (*Smith v. Bruning*, 2 Vern. 392; *Goldsmith v. Bruning*, 1 Eq. Cases Abr. 89.)

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The question in this and kindred cases, therefore, must always be whether the parties are equal in guilt. Obviously cases might arise where this would clearly appear and where the court would be justified in so holding as a matter of law, as where there was an agreement between two, having for its purpose the marriage of one to a third party, the parties would be so clearly *in pari delicto* that the courts would not aid the one who had paid money to the other in the promotion of the common purpose, to recover it back. Such a case would partake of the character of a conspiracy to defraud. So if two parties entered into a partnership to carry on such a business as defendant conducted, the courts would not lend their aid to either to enforce the agreement between them.

But where a party carries on a business of promoting marriage as the defendant appears to have done, it is plain to be seen that the natural tendency of such a business is immoral and it would be so clearly the policy of the law to suppress it and public interest would be so greatly promoted by its suppression, that there would be no hesitation upon the part of the courts to aid the party who had patronized such a business by relieving him or her from all contracts made, and grant restitution of any money paid or property transferred. In that way only could the policy of the law be enforced and public interests promoted.

Contracts of this sort are considered as fraudulent in their character and parties who pay money for the purpose of procuring a husband or wife will be regarded as under a species of imposition or undue influence.

The subject is classed by all text writers under the head of constructive or implied fraud, and it is upon the application of rules which belong to that branch of the law that the cases have been decided to which I have referred.

We are of the opinion, therefore, that it was error to hold as a legal conclusion that the parties to the contract in question were equal in guilt.

The learned General Term of the Common Pleas appeared to have considered that the voluntary character of Mrs. Guion's

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acts was decisive of this question and deprived her of the right of recovery.

It is true there is no evidence of actual over-persuasion or undue influence.

But at most the inferences to be drawn from these facts were for the jury.

The prominent fact in the case is that such a place as the defendant maintained existed in the community with its evil surroundings and immoral tendencies.

What influence was exerted upon the mind of the widow by the mere fact of the existence of such a place to which resort could be had, cannot of course appear except by inference. But if the evidence was not sufficiently strong to authorize the court to hold as a question of law that the parties were not *in pari delicto* it at least presented a question of mixed fact and law for the jury.

Our opinion is that the same reasons that have induced courts to declare contracts for the promotion of marriage void, dictate with equal force that they should be set aside and the parties restored to their original position. To decide that money could not be recovered back would be to establish the rules by which the defendant and others of the same ilk could ply their trade and secure themselves in the fruits of their illegal transactions.

We are of the opinion, therefore, that the Common Pleas erred in reversing the order of the City Court, and that a new trial should have been granted.

The order appealed from should be reversed, and the order of the General Term of the City Court affirmed, with costs.

All concur.

Order reversed.

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EDWARD S. JAFFRAY et al., Respondents, v. SIEGFRIED DAVIS et al., Appellants.

While the payment of a sum less than the amount of a liquidated debt, under an agreement of the creditor to accept the same in satisfaction of the debt, forms no bar to the recovery of the balance, if there be some additional benefit or legal possibility of benefit to the creditor, this will be a sufficient consideration to support an agreement to accept the lesser sum in full payment.

Where, therefore, one indebted on an open book account gave to his creditor his promissory notes for one-half of his debt, secured by a chattel mortgage, under an agreement with the creditor that he would accept the same in full satisfaction and discharge of the debt, and the debtor paid the notes as they became due and the creditor satisfied the mortgage, *held*, that the new agreement was valid and supported by a sufficient consideration; and so, an action could not be maintained to recover the balance of the debt.

Keeler v. Salisbury (33 N. Y. 658); *Platts v. Walrath* (Lal. Sup. 59), limited and distinguished.

Jaffray v. Davis (48 Hun, 500), reversed.

(Argued December 12, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 21, 1888, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

This was an action to recover a balance claimed to be due upon an indebtedness.

The facts, so far as material, are stated in the opinion.

O. F. Wisner for appellants. If the court can see any, even the slightest consideration for the creditor's promise, and if the debtor give additional security, accepted by the creditor, the creditor is bound. (*Carrington v. Crocker*, 37 N. Y. 338; *Boyd v. Hitchcock*, 20 Johns. 76; *Kellogg v. Richards*, 14 Wend, 116; *Luddington v. Bell*, 77 N. Y. 138; *Mitchell v. Wheaton*, 46 Conn. 316; *Brooks v. White*, 2 Metc. 285; *Jones v. Perkins*, 64 Am. Dec. 136; *Hinkley v. Arey*, 27 Me. 362;

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Day v. Gardner, 7 At. Rep. 365; *Bailey v. Day*, 26 Me. 88.) Any security given by the debtor for part of the debt, which the creditor agrees to accept in full, binds the creditor. (20 Johns. 76; 14 Wend. 116; 74 N. Y. 138; 64 Am. Dec. 136; *Warren v. Skinner*, 20 Conn. 559; *Wheeler v. Wheeler*, 11 Vt. 60; *Lee v. Oppenheim*, 32 Me. 253; 6 Wait's Act & Def. 414; *Phillips v. Berger*, 2 Barb. 608; *Little v. Hobbs*, 34 Me. 357.) The original indebtedness of defendants being upon an open account, and plaintiffs having agreed to accept the debtor's promissory notes and chattel mortgage in full satisfaction and discharge of the original indebtedness, they are bound. (21 Am. Law Reg. 641, 642; *Babcock v. Hawkins*, 23 Vt. 561; *Jaffray v. Crane*, 50 Wis. 349; *Butler v. Miller*, 1 N. Y. 496; *Hall v. Sampson*, 35 id. 274; *Farmers' Bank v. Cowan*, 2 Keyes, 217; *Judson v. Easton*, 58 N. Y. 664; *Allison v. Abendroth*, 15 N. E. Rep. 606; *Pullman v. Taylor*, 50 Miss. 251.) By the laws of Michigan, when this agreement was made, these defendants were each entitled to \$250 worth of the property mortgaged, as exempt from execution. This they were each entitled to hold free from any claim of creditors. (*Skinner v. Shannon*, 44 Mich. 86; *Stewart v. Brown*, 37 N. Y. 350.) By virtue of this agreement and the execution and delivery to them of the chattel mortgage, the defendants put themselves in a position when they could no longer claim their exemption as against plaintiff's demand. (Bump on Fraud, 14.)

Isaac L. Miller for respondents. In the case of an undisputed indebtedness, the acceptance of the notes of the debtor for a smaller sum does not preclude the creditor from recovering the balance of the original claim. (*Pinnel's Case*, 4 Coke, 117; *Fitch v. Sutton*, 5 East, 230; *Cumber v. Wayne*, 1 Strange, 426; 1 Smith's L. C. 439; *Down v. Hatch*, 10 Ad. & El. 121; Leak on Cont. [ed. 1878] 888; *Foakes v. Beer*, 36 Eng. Rep. 194; *Bridge Co. v. Murphy*, 13 Kan. 35; *Otto v. Klauber*, 23 Wis. 471; *Wheeler v. Wheeler*, 11 Vt. 60, 66; *Bright v. Coffin*, 15 Ind. 371, 374; *Curtis v. Morton*, 20 Ill. 558, 577;

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Day v. Gardner, 7 At. Rep. 365; *Bryant v. Brazil*, 3 N. W. Rep. 117; *Kooker v. Hyde*, 21 id. 52; *St. Louis v. Davis*, 11 Pac. Rep. 421; *Harriman v. Harriman*, 12 Gray, 341; *Hayes v. Davidson*, 70 N. C. 573; *Daniels v. Hatch*, 21 N. J. L. 391; *Smith v. Phillips*, 77 Vt. 548; *Ryan v. Ward*, 48 N. Y. 204; *Bunge v. Koop*, Id. 225; *Bliss v. Schwartz*, 66 id. 451; *Redfield v. H. P. Co.*, 56 id. 354, 358; *Muller v. Coates*, 66 id. 609; *Irvine v. Milbank*, 15 Abb. [N. S.] 378; *Carrington v. Crocker*, 37 N. Y. 337; *White v. Kuntz*, 107 id. 518, 524; *Conkling v. King*, 10 id. 440; *Benedict v. Ray*, 35 Hun, 34, 36; *Fellows v. Stevens*, 24 Wend. 294; *Moss v. Shannon*, 1 Hilt. 177; *Williams v. Corrington*, Id. 515; *Luddington v. Bell*, 77 N. Y. 143; *Gray v. Barton*, 55 id. 68, 71.) There is neither injustice nor hardship in requiring defendants to do as they agreed, *i. e.*, pay for the merchandise in question, they having received a full equivalent therefor. (1 Story's Eq. Juris. §§ 18-23; 48 N. Y. 430; 55 id. 456.) There is no accord and satisfaction. (*Brooks v. Moore*, 67 Barb. 393; *Williams v. Irving*, 47 How. Pr. 440, 442.) As actual payment of the smaller sum would not discharge the debt, the acceptance of the promise to pay, *i. e.*, defendants' promissory note would, of course, fail to extinguish it. (*Keeler v. Salisbury*, 33 N. Y. 653; *Conkling v. King*, 10 Barb. 372; 10 N. Y. 440.) The giving of a chattel mortgage by defendants on their own property in no way strengthens the defendants' position. (*Keeler v. Salisbury*, 27 Barb. 485; 33 N. Y. 653.) If the case were governed by the laws of Michigan, it would be immaterial. (*Chapin v. Dobson*, 78 N. Y. 79; *Monroe v. Douglass*, 5 id. 447; *Falkner v. Hart*, 82 id. 418.) No fact can be considered by this court for the purpose of reversing a judgment, unless it is either stated in the findings or requested to be found on uncontroverted evidence. (*Thompson v. Bank B. N. A.*, 82 N. Y. 1, 7; *Burnap v. N. Bank*, 96 id. 125, 131.)

POTTER, J. The facts found by the trial court in this case were agreed upon. They are simple and present a familiar question of law. The facts are that defendants were owing

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plaintiffs on the 8th day of December, 1886, for goods sold between that date and the May previous at an agreed price, the sum of \$7,714.37, and that on the 27th of the same December, the defendants delivered to the plaintiffs their three promissory notes amounting in the aggregate to three thousand four hundred and sixty-two twenty-four-one-hundredths dollars secured by a *chattel mortgage* on the stock, fixtures and other property of defendants, located in East Saginaw, Michigan, which said notes and chattel mortgage were received by plaintiffs under an agreement to accept same in full satisfaction and discharge of said indebtedness. "That said notes have all been paid and said mortgage discharged of record."

The question of law arising from these facts and presented to this court for its determination is whether such agreement, with full performance, constitutes a bar to this action, which was brought after such performance to recover the balance of such indebtedness over the sum so secured and paid.

One of the elements embraced in the question presented upon this appeal is, viz., whether the payment of a sum less than the amount of a liquidated debt under an agreement to accept the same in satisfaction of such debt forms a bar to the recovery of the balance of the debt. This single question was presented to the English court in 1602, when it was resolved (if not decided) in *Pinnet's* case (5th Co. R. 117), "that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole," and that this is so, although it was agreed that such payment should satisfy the whole. This simple question has since arisen in the English courts and in the courts of this country in almost numberless instances, and has received the same solution, notwithstanding the courts, while so ruling, have rarely failed, upon any recurrence of the question, to criticise and condemn its reasonableness, justice, fairness or honesty. No respectable authority that I have been able to find has, after such unanimous disapproval by all the courts, held otherwise than was held in *Pinnet* case (*supra*) and *Cumber v. Wane* (1 Str. 426); *Foakes v. Beer* (L. R. [9 App. Cas.] 605; 36 English Reports. 194);

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Goddard v. O'Brien (L. R. [9 Q. B. Div.] 37; Vol. 30, Am. Law Register, 637, and notes).

The steadfast adherence to this doctrine by the courts in spite of the current of condemnation by the individual judges of the court, and in the face of the demands and conveniences of a much greater business and more extensive mercantile dealings and operations, demonstrate the force of the doctrine of *stare decisis*. But the doctrine of *stare decisis* is further illustrated by the course of judicial decisions upon this subject, for while the courts still hold to the doctrine of the *Pinnel* and *Cumber* and *Wane* cases (*supra*), they have seemed to seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, or in other words to extract if possible from the circumstances of each case a consideration for the new agreement, and to substitute the new agreement in place of the old and thus to form a defense to the action brought upon the old agreement. It will serve the purpose of illustrating the adhesion of the court to settled law and at the same time enable us perhaps more satisfactorily to decide whether there was a good consideration to support the agreement in this case, to refer to the consideration in a few of the numerous cases which the courts have held to be sufficient to support the new agreement.

Lord BLACKBURN said in his opinion in *Foakes v. Beer* (*supra*), and while maintaining the doctrine "that a lesser sum cannot be a satisfaction of a greater sum," "but the gift of a horse, hawk or robe, etc., in satisfaction is good," quite regardless of the amount of the debt. And it was further said by him in the same opinion "that payment and acceptance of a parcel before the day of payment of a larger sum would be a good satisfaction in regard to the circumstance of time," "and so if I am bound in twenty pounds to pay you ten pounds at Westminster, and you request me to pay you five pounds at the day at York, and you will accept it in full satisfaction for the whole ten pounds, it is a good satisfaction." It was held in *Goddard v. O'Brien* (L. R. [9 Q. B. Div.] 37; 21 Am. L. Reg. [N. S.] 637) "A. being indebted to B. in 125 pounds 7s & 9d for goods

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sold and delivered, gave B. a check (negotiable I suppose) for 100 pounds payable on demand, which B. accepted in satisfaction, was a good satisfaction." HUDDLESTON, B., in *Goddard v. O'Brien* (*supra*), approved the language of the opinion in *Sibree v. Tripp* (15 M. & W. 26), "that a negotiable security may operate, if so given and taken, in satisfaction of a debt of a greater amount; the circumstance of negotiability making it in fact a different thing and more advantageous than the original debt which was not negotiable."

It was held in *Bull v. Bull* (43 Conn. 455), "and although the claim is a money demand liquidated and not doubtful, and it cannot be satisfied with a smaller sum of money, yet if any other personal property is received in satisfaction, it will be good no matter what the value."

And it was held in *Cumber v. Wane* (*supra*), that a creditor can never bind himself by simple agreement to accept a smaller sum in lieu of an ascertained debt of a larger amount, such agreement being *nudum pactum*, but if there be any benefit or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale and render the consideration sufficient to support the agreement.

It was held in *LaPage v. MoCrea* (1 Wend. 164), and in *Boyd v. Hitchcock* (20 Johns. 76), that "giving further security for part of a debt or other security, though for a less sum than the debt and acceptance of it in full of all demands, make a valid accord and satisfaction."

That "if a debtor gives his creditor a note indorsed by a third party for a less sum than the debt (no matter how much less), but in full satisfaction of the debt, and it is received as such, the transaction constitutes a good accord and satisfaction." (*Varney v. Commey*, 3 East, 25.) And so it has been held "where by mode or time of part payment, different than that provided for in the contract, a new benefit is or may be conferred or a burden imposed, a new consideration arises out of the transaction and gives validity to the agreement of the creditor" (*Rose v. Hull*, 26 Conn. 392), and so if "payment of less than the whole debt, if made before it is due or at a

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different place from that stipulated, if received in full, is a good satisfaction." (*Jones v. Bullitts*, 2 Lit. 49; *Ricketts v. Hall*, 2 Bush. 249; *Smith v. Brown*, 3 Hawks. [N. C.] 580; *Jones v. Perkins*, 29 Miss. 139; *Schweider v. Lang*, 29 Minn. 254; 43 Am. R. 202.)

In *Watson v. Elliott* (57 N. H. 511-513), it was held, "it is enough that something substantial, which one party is not bound by law to do, is done by him or something which he has a right to do he abstains from doing at the request of the other party, is held a good satisfaction."

It has been held in a number of cases that if a note be surrendered (by the payee to the maker), the whole claim is discharged and no action can afterwards be maintained on such instrument for the unpaid balance. (*Ellsworth v. Fogg*, 35 Vt. 355; *Kent v. Reynolds*, 8 Hun, 559.)

It has been held that a partial payment made to another, though at the creditor's instance and request, is a good discharge of the whole debt. (*Harper v. Graham*, 20 Ohio, 106.) "The reason of the rule is that the debtor in such case has done something more than he was originally bound to do or at least something different. It may be more or it may be less, as a matter of fact."

It was held by the Supreme Court of Pennsylvania in *Mechanics' Bank v. Houston* (Feb. 13, 1882, 11 W. Note, case 389), "The decided advantage which a creditor acquires by the receipt of a negotiable note for a part of his debt, is by the increased facilities of recovering upon it, the presumption of a consideration for it, the ease of disposing of it in market, etc., was held to furnish ample reason why it should be a valid discharge of a larger account or open claim unnegotiable."

It has been held that a payment in advance of the time if agreed to is full satisfaction for a larger claim not yet due. (*Brooks v. White*, 2 Met. 283; *Bowker v. Childs*, 3 Allen, 434.)

In some states, notably Maine and Georgia, the legislature, in order to avoid the harshness of the rule under consideration, have by statute changed the law upon that subject by providing, "no action can be maintained upon a demand which has

been canceled by the receipt of any sum of money less than the amount legally due thereon, or for any good and valuable consideration however small." (Citing *Weymouth v. Babcock*, 42 Maine, 42.)

And so in *Gray v. Barton* (55 N. Y. 68), where a debt of \$820 upon book account was satisfied by the payment of \$1 by calling the balance a gift, though the balance was not delivered except by fiction, and the receipt was in the usual form and was silent upon the subject of a gift, and this case was followed and referred to in *Ferry v. Stephens* (66 N. Y. 321).

So it was held in *Mitchell v. Wheaton* (46 Conn. 315; 33 Am. R. 24), that the debtor's agreement to pay and the payment of \$150 with the costs of the suit upon a liquidated debt of \$299 satisfied the principal debt.

These cases show in a striking manner the extreme ingenuity and assiduity which the courts have exercised to avoid the operation of the "rigid and rather unreasonable rule of the old law," as it is characterized in *Johnston v. Brannan* (5 Johns. 268-272), or as it is called in *Kellogg v. Richards* (14 Wend. 116), "technical and not very well supported by reason," or as may be more practically stated, a rule that "a bar of gold worth \$100 will discharge a debt of \$500, while 400 gold dollars in current coin will not." (See note to *Goddard v. O'Brien*, *supra*, in A. Law Register, New Series, vol. 21, pp. 640, 641.)

The state of the law upon this subject, under the modification of later decisions both in England and in this country, would seem to be as expressed in *Goddard v. O'Brien* (Queen's Bench Division, *supra*.) "The doctrine in *Cumber v. Wane* is no doubt very much qualified by *Sibree v. Tripp*, and I cannot find it better stated than in 1st Smith's Leading Cases [7th ed.] 595." The general doctrine in *Cumber v. Wane*, and the reason of all the exceptions and distinctions which have been engraved on it, may perhaps be summed up as follows, viz.: "That a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being *nudum pactum*. But

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if there be any benefit or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale and render the consideration sufficient to support the agreement." (*Bull v. Bull*, 43 Conn. 455; *Fisher v. May*, 2 Bibb. 449; *Reed v. Bartlett*, 19 Pick. 273; *Union Bank v. Geary*, 5 Peters, 99-114; *LaPage v. McCrea*, 1 Wend. 164; *Boyd v. Hitchcock*, 20 Johns. 76; *Brooks v. White*, 2 Metc. 283; *Jones v. Perkins*, 29 Miss. 139-141; *Hall v. Smith*, 15 Iowa, 584; *Babcock v. Hawkins*, 23 Vt. 561.)

In the case at bar the defendants gave their promissory notes upon time for one-half of the debt they owed plaintiff, and also gave plaintiff a chattel mortgage on the stock, fixtures and other personal property of the defendants under an agreement with plaintiff, to accept the same in full satisfaction and discharge of said indebtedness. Defendants paid the notes as they became due, and plaintiff then discharged the mortgage. Under the cases above cited, and upon principle, this new agreement was supported by a sufficient consideration to make it a valid agreement, and this agreement was by the parties substituted in place of the former. The consideration of the new agreement was that the plaintiff, in place of an open book account for goods sold, got the defendants' promissory notes, probably negotiable in form, signed by defendants, thus saving the plaintiff perhaps trouble or expense of proving their account, and got security upon all the defendants' personal property for the payment of the sum specified in the notes, where before they had no security.

It was some trouble at least, and perhaps some expense to the defendants to execute and deliver the security, and they deprived themselves of the legal ownership, or of any exemptions or the power of disposing of this property, and gave the plaintiff such ownership as against the defendants, and the claims thereto of defendants' creditors, if there were any.

It seems to me, upon principle and the decisions of this state (save perhaps *Keeler v. Salisbury*, 33 N. Y. 653, and *Platts v. Walrath*, Lalor's Supp. 59, which I will notice further on), and of quite all of the other states, the transac-

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tions between the plaintiff and the defendants constitute a bar to this action. All that is necessary to produce satisfaction of the former agreement is a sufficient consideration to support the substituted agreement. The doctrine is fully sustained in the opinion of Judge ANDREWS in *Allison v. Abendroth* (108 N. Y. 470), from which I quote: "But it is held that where there is an independent consideration, or the creditor receives any benefit or is put in a better position, or one from which there may be legal possibility of benefit to which he was not entitled except for the agreement, then the agreement is not *nudum pactum*, and the doctrine of the common law to which we have adverted has no application." Upon this distinction the cases rest which hold that the acceptance by the creditor in discharge of the debt of a different thing from that contracted to be paid, although of much less pecuniary value or amount, is a good satisfaction, as for example, a negotiable instrument binding the debtor and a third person for a smaller sum. (*Curler v. Clark*, 3 Exch. 375.) Following the same principle it is held that when the debtor enters into a new contract with the creditor to do something which he was not bound to do by the original contract, the new contract is a good accord and satisfaction if so agreed. The case of accepting the sole liability of one of two joint debtors or copartners in satisfaction of the joint or copartnership debt is an illustration. This is held to be a good satisfaction, because the sole liability of one of two debtors "may be more beneficial than the joint liability of both, either in respect of the solvency or of the parties, or the convenience of the remedy." (*Thompson v. Percival*, 5 B. & Adol. 925.) In perfect accord with this principle is the recent case in this court of *Ludington v. Bell* (77 N. Y. 138), in which it was held that the acceptance by a creditor of the individual note of one of the members of a copartnership after dissolution for a portion of the copartnership debt was a good consideration for the creditor's agreement to discharge the maker from further liability. (*Pardee v. Wood*, 8 Hun, 584; *Douglass v. White*, 3 Barb. Chy. 621-624.)

Notwithstanding these later and decisive authorities, the

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plaintiff contends that the giving of the defendants' notes with the chattel mortgage security and the payment, such consideration was insufficient to support the new or substituted agreement, and cites as authority for such contention the cases of *Platts v. Walrath*, Lalor's Supp. 59), and *Keeler v. Salisbury* (33 N. Y. 648).

Platts v. Walrath arose in justice court, and the debt in controversy was put forth as a set-off. The remarks of the judge in the former case were quite obiter, for there were various subjects in dispute upon the trial, and from which the justice might have reached the conclusion that he did. The judge in the opinion relied upon says: "Looking at the loose and secondary character of the evidence as stated in the return, it was perhaps a question of fact whether any mortgage at all was given; or, at least, whether, if given, it was not in terms a mere collateral security for the large note," "even the mortgagee was left to parol proof. Did it refer to and profess to be a security for the note of \$1,500, or that sum less the fifty dollars agreed to be thrown off, etc., etc.?"

There is so much confusion and uncertainty in the case that it was not thought advisable to publish the case in the regular series of reports. The case of *Keeler v. Salisbury* (*supra*), is not to be regarded as an authority upon the question or as approving the case of *Platts v. Walrath* (*supra*). In the case of *Keeler v. Salisbury*, the debtor's wife had joined in the mortgage given by her husband, the debtor, to effect the compromise, thus releasing her inchoate right of dower. The court held that fact constituted a sufficient consideration to support the new agreement, though the court in the course of the opinion remarked that it had been held that the debtor's mortgage would not be sufficient, and referring to *Platts v. Walrath*. But the court did not otherwise indicate any approval of that case, and there was no occasion to do so, for, as before stated, the court put its decision upon the fact that the wife had joined in the mortgage.

In view of the peculiar facts in these two cases and the numerous decisions of this and other courts hereinbefore

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referred to, I do not regard them as authorities against the defendant's contention that the plaintiff's action for the balance of the original debt is barred by reason of the accord and satisfaction, and that the judgment should be reversed, with costs.

All concur.

Judgment reversed. _____

DANIEL J. NOYES, Appellant, v. THERESA A. ANDERSON,
Impleaded, etc., Respondent.

A court of equity has power to relieve a party against forfeiture or penalty incurred by the breach of a condition subsequent, when no willful neglect on his part is shown, upon the principle that a party having a legal right shall not be permitted to avail himself of it for the purpose of injustice and oppression.

In an action for the foreclosure of a mortgage, defendant A., the owner of the equity of redemption, set up as a defense an agreement whereby for a good consideration plaintiff agreed that no proceedings would be instituted to enforce the mortgage, which was then due, until one year after the death of A., provided that during said period prior mortgages upon the same property, which with plaintiff's mortgage exceeded its value, remained unforeclosed and no interest thereon unpaid for more than thirty days after due "and so long as no taxes or assessments on the said premises remain unpaid and in arrears for more than thirty days." The complaint was filed April 27, 1887. An assessment of \$23.08 for a sewer, made and confirmed in March, 1886, remained unpaid. Defendant alleged that she did not know of said assessment until about April 28, 1887, the day before the service, when she promptly caused it to be paid. The court found that such non-payment was due to the negligence of A.'s son, with whom A., she being absent, had left money sufficient to make the payment. It appeared that when he paid the taxes in 1886, he was informed by some one at the tax office that nothing was due or in arrears against the property. The court directed judgment for plaintiff. *Held* (FOLLETT, Ch. J. and PARKER, J., dissenting), error; that the default plaintiff seeks to avail himself of would result in a forfeiture, from which or its consequences a court of equity had power to relieve.

(Argued December 12, 1890; decided January 14, 1891.)

APPEAL from order of the General Term of the Court of Common Pleas for the city of New York, made March 14,

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1888, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term, and granted a new trial.

The action was brought in 1887 to foreclose a mortgage, of date January 1, 1884, made by the defendant Anderson and her husband, John J. Anderson, upon certain premises in the city of New York, to secure the payment of \$12,500, and interest, to the plaintiff on the 1st day of January, 1885, according to the condition of a bond of the mortgagors. The husband died in January, 1885. The defendant Anderson, by her answer, set up an agreement made and delivered by the plaintiff to her October 2, 1885, which after recital referring to such bond and mortgage, stated that in consideration of certain agreements made by said Theresa A. Anderson in and about the settlement and adjustment of the action then pending in the Court of Common Pleas, wherein Noyes, as executor, etc., was plaintiff and she was defendant, and of one dollar to him in hand, "I, Daniel J. Noyes, do hereby covenant and agree with the said Theresa A. Anderson that during the natural life of Theresa A. Anderson, and for one year after her decease, I will not institute, or permit to be instituted, any proceedings at law, or otherwise, to enforce the aforesaid bond and mortgage held by me so long within said period as the prior mortgages remain unforeclosed, and no interest on said prior mortgages, or either of them, remains unpaid for more than thirty days after the interest shall have accrued and be payable by the terms thereof, and so long as no taxes or assessments on the said premises remains unpaid and in arrears for more than thirty days." It was stated in the complaint that the premises were encumbered by an assessment amounting to \$23.08 for sewer improvement made and confirmed in March, 1886, remained unpaid; the defendant, by her answer, alleged that she had no knowledge of such assessment until about April 28, 1887, when she promptly caused it to be paid. And she asked for the judgment of the court that she be relieved from the consequences of her omission to pay such assessment. The summons and complaint were filed with the clerk, and

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served upon defendant Corwin, who had an apparent lien by judgment, on April 27, 1887, and *lis pendens* was filed on that day, and pursuant to an order of publication made April twenty-ninth, the summons and complaint were personally served upon the defendant Anderson at Chicago in the state of Illinois, on May 5, 1887. The trial court directed judgment for the plaintiff.

Further facts are stated in the opinion.

Thomas Allison for appellant. The rulings of the trial court upon questions of fact were sustained and required by the evidence and should not be reversed. (Code Civ. Pro. §§ 992, 993, 1337, 1338; *Baird v. Mayor, etc.*, 96 N. Y. 567, 576.) The defendant's contention that the plaintiff's right of action, if he had any, was not upon the bond and mortgage, but upon the agreement of October 2, 1885; that the mortgage was merged in the agreement of October 2, 1885, and that Mrs. Anderson thereby had a life estate, were untenable. (*A. C. N. Bank v. Hunsiker*, 72 N. Y. 252; *Knight v. Dunlap*, 5 id. 537; *McKillip v. Metzger*, 50 id. 658; *Homer v. G. M. L. Ins. Co.*, 67 id. 478, 481; *Levy v. Burgess*, 64 id. 390.) There is no precedent nor any principle upon which equity can relieve the defendant from her default or deprive the plaintiff of the right to foreclose. (Willard's Eq. Juris. 37, 38; 1 Story's Eq. Juris. §§ 18-23; *Weed v. Weed*, 94 N. Y. 243, 247, 248; *Canady v. Stiger*, 55 id. 452, 455, 456; *Ashley v. Dixon*, 48 id. 430, 442; *Warner v. Warren*, 46 id. 228, 233, 234; *Noyes v. Clark*, 7 Paige, 179; *Hale v. Gouverneur*, 4 Edw. Ch. 207; *Crane v. Ward*, Clarke's Ch. 393; *Hunt v. Keech*, 3 Abb. Pr. 204; *Ferris v. Ferris*, 28 Barb. 29; *Dwight v. Webster*, 32 id. 47; *Valentine v. Van Wagner*, 37 id. 60; *Grussy v. Schneider*, 50 How. Pr. 134, 138; *Rubens v. Prindle*, 44 Barb. 344; *Bennett v. Stevenson*, 53 N. Y. 508; *Malcom v. Allen*, 49 id. 448; *O'Connor v. Shipman*, 48 How. Pr. 126.)

Charles Donohue for respondent. It was well settled that mere delay in making stipulated payments will not work a forfeiture, and we claim that the merger of the mortgage into the agreement created an estate or life tenancy in favor of

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the defendant, from which she cannot be divested, provided she complied with the spirit of the agreement. It is perfectly clear that the agreement of October 2, 1885, was intended to supplant the provisions contained in the mortgage. (*Bennett v. Stevenson*, 53 N. Y. 508; *Giles v. Austin*, 62 id. 486; *Doran v. Ins. Co.*, 86 id. 635.) Apart from the question, however, of the construction of the contract of October 2, 1885, the evidence shows clearly that at the time of the defendant's default the plaintiff had money of hers in his possession or owed her money which, according to equity, he should have applied to the payment of the assessment. (*Bathgate v. Haskins*, 59 N. Y. 553; *Jones on Mort.* §§ 1080, 1134; *Lynch v. Cunningham*, 6 Abb. Pr. 361; *Wilcox v. Allen*, 36 Mich. 160; *Martin v. Melville*, 3 Stock. Ch. 322; *Giles v. Austin*, 62 N. Y. 486; *Story's Eq. Juris.* §§ 1314, 1315, 1316; *Broderick v. Smith*, 15 How. Pr. 434; *Thurston v. March*, 5 Abb. Pr. 389; *Noyes v. Clarke*, 7 Paige, 179; *Malcolm v. Allen*, 49 N. Y. 449; *Bennett v. Stevenson*, 53 id. 408.) The exceptions to the findings of fact and conclusions of law made by the defendant show that the reversal of the General Term was upon the facts as well as the law. The appellant Noyes can, therefore, only present questions of law in this court for review. (*Roberts v. Tobias*, 120 N. Y. 1.)

BRADLEY, J. The agreement of October 2, 1885, by which the plaintiff agreed that no proceedings should, upon certain conditions, be taken to enforce the bond and mortgage during the life of Mrs. Anderson, and for one year thereafter, was founded upon a good consideration; and, inasmuch as she had been in default in payment of the sewer assessment more than thirty days at the time of the commencement of this action, the main question is whether she was, under the circumstances, entitled to relief against the consequences of such default. At the time the agreement was made the principal sum secured by the bond and mortgage had become due and payable. The prior mortgages, amounting to \$20,000, with that held by the plaintiff, amounted to a sum exceeding the value of the

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premises, so that the only value of the equity of redemption to the defendant was, in the observance of the plaintiff's agreement, to postpone the foreclosure of the mortgage. In view of those circumstances, and of the fact that the defendant was known to be insolvent, it is evident that the purpose of the agreement was to protect her equity of redemption. This was her estate in the premises, and the right to her enjoyment of it was wholly dependent upon the forbearance of the foreclosure of the plaintiff's mortgage, provided no action should be taken on the prior mortgages. And the arrangement resulting in the agreement was made to enable her, so far as the observance of its provisions permitted, to have the benefit of such estate during her life. The right, therefore, to maintain this action to foreclose the mortgage was dependent upon the failure of the defendant to perform some condition in the agreement, and a forfeiture of her right to the further protection under it of her equity of redemption.

The power of a court of equity in cases properly requiring it, will be exercised to relieve a party against forfeitures and from penalties. And this is upon the principle of equity jurisprudence that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice or oppression. The doctrine was applied to relieve a mortgagor from the forfeiture to which he was subjected, and an obligor from the penalty with which he was chargeable by the common law on default. It is also not only available to cases of leases where forfeiture of the term and entry are provided for as the consequences of non-payment of rent on the day it becomes due, but is extended to other cases, and more especially to those (although not necessarily confined to them) where the default resulting in forfeiture is in payment of money, as in such case adequate compensation can be made. (Pomeroy Eq. Jur. §§ 433, 450, 451.) This relief will not be afforded in cases where the default and forfeiture have been occasioned by the willful neglect of the party seeking it. Nor will it ordinarily be given where the breach is of a condition precedent, although that rule may not be without exception. In

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the present case the default was in the performance of a condition subsequent, because the right of the plaintiff under the contract vested on its delivery subject to the provision that it should be avoided or rendered ineffectual by a subsequent breach of the conditions, or any of them, upon the observance of which the defendant's right given by the contract depended. And the defeat of such right by her default, which the plaintiff by this action seeks to make available for the foreclosure of the mortgage, would result in a forfeiture from which, or the consequences of it, the court upon the principle before mentioned may have relieved the defendant, if in other respects she was entitled to the interposition of its equitable powers for that purpose. The stipulation of the plaintiff's agreement essentially differs, in its nature and object, from a provision in a mortgage to the effect that the principal sum shall become due on a specified default in the payment of interest as provided by it. In the latter case provision is so made for the time when the principal sum may become due, and that time is regulated by an event which may or may not occur so far as it is dependent upon the default of the mortgagor. The consequence so produced is not deemed a forfeiture. The result is maturity of the principal debt at the time, not definitely fixed, when the mortgage is made, but specifically stipulated for in that instrument. And in such case the court as a rule will not grant relief to the mortgagor from the effect of his default when nothing is done on the part of the mortgagee to render it unconscionable for him to avail himself of it. (*Noyes v. Clark*, 7 Paige, 179; *Malcolm v. Allen*, 49 N. Y. 448; *Bennett v. Stevenson*, 53 id. 508.) But the case at bar must be considered and determined in the light of the undisputed facts and circumstances under which the agreement was made, and in reference to the purpose represented by it. The money secured by the mortgage was due at that time. The parties made no stipulation modifying the terms of the bond and mortgage, nor in terms extending the time of payment, although the right to pay it would exist while foreclosure was suspended. Payment evidently was not contemplated. Nor was the mere

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extension of the time of payment of the mortgage debt the object or purpose of the agreement. And the conditions which the defendant was required to perform were independent of such debt, and did not embrace the payment of any part of it. The purpose was to obtain and give protection to the defendant's estate, consisting of her equity of redemption, that she might have the beneficial enjoyment of it during her life, subject only to certain conditions to be by her performed. The primary purpose of the arrangement represented by the agreement, was to secure to Mrs. Anderson, for such time so far as it would have that effect, the estate she then had in the premises, which could not be retained by her without the suspension of the foreclosure of the mortgage. The effect, therefore, given to her default by foreclosure of the mortgage would be the forfeiture of her estate in the premises, and no less so under the circumstances than would be that of a tenant of his term, by entry of his landlord for non-payment of rent pursuant to a provision in the lease.

In *Giles v. Austin* (62 N. Y. 486), which was a case of that character, Judge RAPALLO, in delivering the opinion of the court, said: "The cases in which relief has been denied, are either where the lessee has wilfully committed some affirmative act in violation of his covenant or been guilty of some default, the precise damage for which cannot be ascertained by any rule. But where the covenant is simply for the payment of money, the forfeiture is regarded as security merely for such payment, and equity will not allow it to be enforced after the party has obtained all that it was intended to secure to him." So in the present case the purpose of the condition, subject to which the right of the defendant was taken and to be held under the agreement, was not to permit the increase of the amount of the prior mortgages by the accumulation of interest upon them, or allow charges for taxes and assessments to remain on the premises. This was the extent of the requirement, and it may necessarily be supposed that the consequences which the contract permitted to result to her from default, were intended to secure the accomplishment of such purpose. The

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case, so far as relates to the nature of the agreement and its object, comes within those to which the equitable doctrine before mentioned may properly be applicable. (*DeForest v. Bates*, 1 Edw. Chy. 393; *Atkins v. Chilson*, 11 Met. 112; *Hagar v. Buck*, 44 Vt. 285; 8 Am. Dec. 368.)

The sewer assessment of \$23.08 had been standing upwards of a year when this action was commenced, and when the defendant's attention was called to it, the assessment was promptly paid the day previous to the service on her at Chicago of the summons and complaint. The trial court found that the previous non-payment of it was owing solely to the negligence of the defendant's son, an agent, Henry S. Anderson. The facts bearing upon that subject are undisputed. There is nothing in the evidence to permit the inference that the defendant did not intend to promptly pay all taxes and assessments on the property. She left that matter in charge of her son, who resided in the city, and she was away from there. He paid the taxes in 1886, and had in his hands the defendant's money with which to pay such charges, and sufficient to pay the assessment during the time it remained unpaid, and the only reason of his failure to pay it was that he did not know that it was made or existed. It appears that he might have ascertained about it at the office of the clerk of arrears. But when he paid the tax of 1886, at the tax office in the city, the son was, upon his inquiry, informed by some one in the office that there was no sum due or in arrears against the property.

It is clear that the purpose of the defendant's son was to pay the taxes and assessments, and that his failure to make an earlier payment in this instance was not willful neglect on his part, nor was the plaintiff prejudiced by it.

The plaintiff is entitled to all the inferences properly deducible from the evidence as well as the benefit of the facts found upon it, in support of the judgment of the Special Term, as it must be assumed that it was reversed by the General Term on questions of law only, since nothing in the decision appears to the contrary. But we think, upon undisputed evidence and in view of the facts as found by the court, the

Dissenting opinion, per PARKER, J.

case was one in which the defendant Anderson was entitled to equitable relief, and that the absolute denial of it to her was error. The defendant may properly have been chargeable with some costs. And in view of the situation neither party should have costs of the Special Term.

The order should be affirmed and judgment absolute directed for the defendant to the effect that she be relieved from the consequences of her default in the payment of such assessment, with costs of the appeal to the General Term and in this court.

PARKER, J. (dissenting). A stipulation that a debt, the payment of which is secured by a mortgage on real estate, shall become due and the security foreclosable, upon the failure of the mortgagor to pay interest as it falls due, or the taxes assessed on the mortgaged premises, is neither a penalty nor a forfeiture, and a court in the absence of fraud on the part of the mortgagee, cannot relieve the mortgagor from the consequences of his neglect to pay according to the terms of his contract. (Jones on Mortgages, §§ 77, 1180, 1181, 1182; Wiltsie on Mort. For. §§ 43, 44, 45, 46, 47; Thomas on Mortgages, § 228, and the cases cited in the sections of the text-books referred to.) The stipulation gave an extension of credit. Its continuance until one year after defendant's death being made dependent on the non-foreclosure of prior mortgages, the payment of interest within thirty days after maturity, and taxes and assessments within thirty days after the same shall be in arrears. From the failure to pay taxes or assessments the court can no more relieve a party than from the failure to pay interest, which it cannot do in the absence of fault on the part of the mortgagee. (*Hale v. Gouverneur*, 4 Edw. Ch. 207; *Spring v. Fisk*, 21 N. J. Eq. 175, 178; *Ferris v. Ferris*, 28 Barb. 29; *Bennett v. Stevenson*, 53 N. Y. 508.) It is not asserted that the mortgagee here was in fault. The defendant merely attempts to excuse her neglect. A similar attempt was made in *Ferris v. Ferris* (*supra*), but without avail.

All concur with BRADLEY, J., except FOLLETT, Ch. J., and PARKER, J., dissenting, and HAIGHT, J., not sitting.

Order affirmed and judgment accordingly.

Statement of case.

WILLIAM TAYLOR, Respondent, v. ENOCH MORGAN'S SONS
COMPANY, Appellant.

Plaintiff, who had been for a number of years a traveling salesman over a certain route, and who had been in defendant's employ under an oral agreement to sell its goods on commission, he to have the exclusive right to sell over that route without interference by the company or its salesmen, entered into a written agreement with it by which he agreed to travel over said route, which was termed in the contract "his route," at least six times a year, representing and selling defendant's goods and selling no other goods to conflict with them; defendant agreed to pay him for his services a commission on all orders accepted from *bona fide* purchasers, the commission on new trade to be double that allowed on the regular trade. Plaintiff entered upon his duties under the agreement and continued to discharge them until the agreement was terminated. In an action to recover commissions unpaid, it appeared that some of the orders accepted by the defendant came directly to it from the persons making them and some were taken by other employes of the company, also that orders were received from responsible parties which were not accepted by defendant. The referee allowed plaintiff commissions on all accepted orders made by parties on the line of his route with certain exceptions specified in the contract, and also upon such unaccepted orders. *Held*, no error, that the commissions were not limited to orders obtained and received by plaintiff; and that defendant had no right arbitrarily and without cause to reject orders from *bona fide* purchasers.

Reported below, 48 Hun, 483.

(Argued December 15, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department entered upon an order made May 18, 1888, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Austen G. Fox for appellant. The referee erred in excluding evidence tending to show the sense in which the contracting parties used certain of the terms found in the written agreement. (*Agawam Bank v. Strever*, 18 N. Y. 502, 510, 511; *Goodrich v. Stevens*, 5 Lans. 230, 231; *Walrath v. Thompson*, 4 Hill, 200, 201; *Miller v. Stevens*, 100 Mass. 518, 521, 522;

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Ganson v. Madigan, 15 Wis. 144, 153, 154; *U. T. Co. v. Whiton*, 97 N. Y. 172; *M. P. Co. v. Moore*, 104 id. 680; *Hart v. Hammet*, 18 Vt. 127; *Keller v. Webb*, 125 Mass. 88; *Footte v. Beecher*, 78 N. Y. 155, 157.) The referee allowed the plaintiff the sum of \$276.51 upon orders not accepted by the defendant; this was erroneous. (*Keller v. Webb*, 125 Mass. 88.)

Wm. H. Hamilton for respondent. The contract must receive a reasonable construction. It did not give the company the right, arbitrarily, to reject an order without some good and sufficient reason. (*Stewart v. Marvel*, 101 N. Y. 357.) The exceptions taken by defendant to the rulings of the referee, which excluded, for the time being, oral statements and claims said to have been made by the plaintiff and Simonds at the time of the making of the contract are untenable. (*Englehorn v. Reitlinger*, 33 N. Y. S. R. 275.) The court must be satisfied, upon examination of the whole case, that the appellant was prejudiced by the admission of evidence to warrant a reversal. (*McGean v. M. R. R. Co.*, 117 N. Y. 219.)

HAIGHT, J. This action was brought to recover commissions claimed to be due from the defendant on sales of merchandise. The claim was based upon a written contract; and the principal question brought up for review involves the interpretation of the contract.

The plaintiff had been for a number of years a traveling salesman for Colgate & Co., through the states of New York, New Jersey and Pennsylvania. The defendant was engaged in the manufacture and sale of soaps of various kinds, including sapolio.

The plaintiff first entered the employment of the defendant under an oral agreement whereby he was to represent and sell the defendant's laundry soaps and sapolio throughout the states of New York, New Jersey and Pennsylvania, and to receive therefor as compensation, commissions on the *defendant's* sales in those states. It was further understood that he was to have

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the exclusive right to represent and sell the defendant's soaps in those states, and that he should not be interfered with by the company or its salesmen.

After serving the defendant nine months under this agreement a controversy arose, and the employment thereunder was terminated. A settlement, however, was agreed upon and the contract under consideration executed. It is in the form of a letter addressed to the plaintiff by the secretary of the defendant, with the acceptance of the plaintiff written thereunder. The material portion necessary to consider upon this review is as follows :

“ NEW YORK, *December 22, 1881.*

“ WILLIAM TAYLOR, Esq., Present,

“ DEAR SIR — Having determined and settled all differences between yourself and this company by placing to your credit five hundred dollars on December 1st, we herein confirm the understanding as to the future from that date, viz. :

“ You are to travel over your route in this state, New Jersey and Pennsylvania at least six times per year, and represent and sell our brands of laundry soap, sapolio, and other goods, paying your own expenses, handling no other goods to conflict with ours, to conduct yourself and the business in a manner to our general satisfaction, for which we agree to pay you a commission *upon all orders* accepted from *bona fide* purchasers, as follows, viz. : On all laundry soaps sold at a price of not less than three and three-fourths cents per pound of ten per cent ; on all sapolio sold to trade not heretofore sold by us, ten per cent ; on all sapolio to our regular trade, outside of this city, Brooklyn and certain parties in Newark, five per cent ; and on other goods and sales as may be agreed upon between us.”

The referee has found as facts that the plaintiff entered upon his duties under this agreement ; that he traveled to and through the places mentioned, introduced and sold large quantities of soap, sapolio and sal-soda, and continued in the discharge of his duties until about the 1st day of January, 1884, when the agreement was terminated. It was also found that some of

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the orders accepted by the defendant came directly to it from the individuals making the order, and that some were taken by other employes of the company.

The referee held that the plaintiff was entitled to recover commissions on all orders made by parties on the line of his route in the states named outside of the territories excepted by the provisions of the contract, for which he gave judgment for the balance due. On the part of the defendant it was claimed that he was only entitled to commissions on orders taken by him and forwarded to the company.

It will be observed that under the provisions of the contract the plaintiff was required to travel over his route in the three states named, at least six times per year, and represent and sell the defendant's goods, he paying his own expenses. His entire reward for the services rendered was in the commissions which the defendant agreed to pay him. He had for many years been engaged in a similar business for Colgate & Co., had a line of acquaintances and customers, and it became his duty to use his best endeavors to extend the defendant's trade, introducing its soaps, sapolio and other goods to the dealers with whom he should be acquainted. He was to be paid commissions "upon *all* orders accepted from *bona fide* purchasers." This language is broad and sufficient to support the contention of the respondent. Had it been the intention of the defendant to limit his commissions to orders obtained and received from him, apt words, clearly expressing that intent, would doubtless have been used. The route was specified as *his*, and under the previous contract, as we have seen, he was given the exclusive right to sell without interference by the company or its salesmen. On sapolio sold to the trade, not previously sold by the defendant, he was to have a commission of ten per cent, whilst on the sapolio sold to the regular trade of the defendant, he was to have but five per cent; thus clearly indicating an intention to allow commissions upon the old as well as the new trade. The plaintiff could hardly be expected to drum up customers at his own expense without receiving any benefit from sales made to such.

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The wording of the contract is such as to lead us to conclude that the interpretation adopted by the referee expressed the intention of the parties, and that the same should be approved.

It is contended on the part of the appellant that the court improperly admitted oral evidence on the part of the plaintiff tending to explain the provisions of the agreement, and excluded such evidence offered on behalf of the defendant. Evidence of this character, when first offered by the defendant, was excluded and an exception taken; but, as we understand, the evidence so excluded was subsequently given, thus curing the defect, if any. We do not understand the provisions of the contract to be so ambiguous as to make oral testimony necessary in order to explain its meaning, and we quite agree with the General Term that all of the evidence taken upon this branch of the case might have been properly excluded; but we do not see how harm has resulted to the defendant, for without the evidence we should be compelled to reach the same conclusion in reference to the meaning of the contract.

The referee allowed the plaintiff commissions upon orders from responsible parties, which were not accepted by the defendant. We incline to the view that it was the duty of the defendant to accept all orders presented by the plaintiff from *bona fide* purchasers, which were made in accordance with the provisions of the contract, and that they did not have the right, without cause, to arbitrarily refuse to accept such orders. Such a construction of the contract would require the plaintiff to travel over the territory mentioned, at his own expense, six times a year, with a right on the part of the defendant to reject every order presented by him, and to thus deprive him of any commissions.

Other exceptions have been presented and considered, but none appear which render a new trial necessary.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

Statement of case.

THE CONCORDIA SAVINGS AND AID ASSOCIATION, Respondent, v.
JOHN J. P. READ et al., Appellants.

An undertaking given on appeal to the General Term, from a decree in a foreclosure suit, instead of being in the form prescribed by the Code of Civil Procedure (§ 1331), for an undertaking to stay proceedings in such an action was in the form prescribed (§ 1327) to stay execution on a money judgment. Plaintiff's attorneys accepted the undertaking and did not take proceedings to enforce the decree pending the appeal; this resulted in an affirmance, but during its pendency the property was sold pursuant to a decree of foreclosure and sale founded on a prior mortgage. In an action upon the undertaking, *held*, that while it was valid as a common-law agreement, and enforceable according to its terms, as no sum was recovered or directed to be paid by the judgment appealed from, the defendants were not liable beyond the amount of costs; that their agreement could not be enlarged so as to embrace the payment of the amount decreed to be paid out of the proceeds of the sale of the real estate; and so, that a recovery of this amount was error.

Goodwin v. Bunzl (102 N. Y. 224), distinguished.

(Argued December 15, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made January 24, 1888, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court.

This action was brought upon an undertaking given on appeal to the General Term from a judgment of foreclosure and sale in the usual form.

The undertaking did not comply with the requirements of section 1331 of the Code of Civil Procedure; aside from the clause relating to costs and damages, it was in accordance with the provisions of section 1327. The following is a copy thereof:

"WHEREAS, on the 27th day of January, 1879, in the Erie County Court, the above named respondent the Concordia Savings and Aid Association recovered judgment against the above named appellants Emil Meir, Elizabeth A. S. Read et al., for \$518.30 damages and costs, and the said Elizabeth A. S. Read feeling aggrieved thereby intends to appeal therefrom to

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the General Term of the Supreme Court. Now, therefore, I, John J. P. Read, doing business at No. 500 Washington street, in the city of Buffalo, Erie county, N. Y., by occupation a merchant, and Fannie P. Cottle, of Little Falls, Herkimer county, N. Y., without occupation, do hereby, pursuant to the statute, jointly and severally undertake that the appellant will pay all costs and damages which may be awarded against her upon said appeal not exceeding \$500, and do also undertake that if the judgment so appealed from, or any part thereof is affirmed or said appeal is dismissed, the appellant will pay the sum recovered or directed to be paid by the judgment, or the part thereof as to which it shall be affirmed; and said Fannie P. Cottle hereby charges her separate estate with the payment thereof.

“Dated at BUFFALO, N. Y., Nov. 29, 1879.

“J. J. P. READ.

“FANNIE P. COTTLE.”

Plaintiff's attorneys accepted the undertaking and did not take proceedings to enforce the judgment pending the appeal. It resulted in an affirmance. In the meantime the property was sold pursuant to a judgment of foreclosure and sale founded on a prior mortgage. After the entry of judgment on the order of affirmance and the giving of notice thereof to appellant's attorneys, this action was commenced.

O. O. Cottle for appellants. The obligation of the sureties to the undertaking contained no express agreement on their part to pay any deficiency after sale of the mortgaged premises. There has been no sale under the judgment of the mortgaged premises, and there is no judgment for deficiency. Upon such an undertaking the sureties incurred no liability for the mortgage debt, or for any deficiency which might arise on a sale. (*Knapp v. Van Etten*, 55 Hun, 428; *Barnard v. Onderdonk*, 98 N. Y. 158; *Wood v. Fisk*, 63 id. 245; *Wiltzie on Mort.* § 463; *Bache v. Dorcher*, 9 J. & S. 151-157; *Loeb v. Willis*, 22 Hun, 508; *Grow v. Snell*, 4 Civ. Pro. Rep. 335; *Grow v. Garlock*, 29 Hun, 598, 601; *Russell v. Perkins*, 1

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Mason, 368; *Laddon v. Simons*, 2 Caine's Cas. 42, 57.) The judgment proved is not such a judgment as the complaint alleges or the undertaking describes. The judgment alleged in the complaint and described in the undertaking, was one for damages and costs against Emil Meier, Elizabeth A. S. Read and others; while the judgment proved was a foreclosure judgment with no personal liability of Elizabeth A. S. Read. The judgment proved is not within the allegations of the complaint, or within the terms of the undertaking. (*Knapp v. Van Etten*, 8 N. Y. Sup. 415; *Barnard v. Onderdonk*, 98 N. Y. 167; *Grow v. Garlock*, 29 Hun, 601; *S., S. & Co. v. Aldrich*, 3 McLean, 383; *Loeb v. Willis*, 22 Hun, 508; *Grant v. Naylor*, 4 Cranch, 224; *Arlington v. Merricke*, 3 Saund. 411; *N. M. Bank v. Conklin*, 90 N. Y. 116; *Wood v. Fisk*, 63 id. 245; *Ludlow v. Simons*, 2 Caine's Cas. 42, 57; *McClusky v. Cromwell*, 1 Kern. 593; *Rogers v. Warner*, 8 Johns. 119; *Walrath v. Thompson*, 6 Hill, 541; *Dobbins v. Bradley*, 17 Wend. 422; *Hunt v. Smith*, Id. 179; *Nat. Bank of Batavia v. Tarbox*, 38 Hun, 57; *Russell v. Perkins*, 1 Mason, 368; *Wright v. Russell*, 3 Wilson, 530; *Strauge v. Lee*, 3 East, 484; *Gold v. Phillips*, 10 Johns. 412; *Penoyer v. Watson*, 16 id. 100; *Robbins v. Bingham*, 4 id. 476; *Bill v. Barker*, 16 Gray, 62; *Wetson v. Barton*, 4 Taunt. 673; *Marvin v. Smith*, 56 Barb. 607; 46 N. Y. 571.) The plaintiff is not entitled to equitable relief, because the defendants stand merely in the position of sureties. (1 Story's Eq. Juris. § 176; *Wood v. Fisk*, 63 N. Y. 245; *Yale v. Dederer*, 18 id. 265; *Marvin v. Smith*, 56 Barb. 605; *Kelso v. Tabor*, 52 id. 125, 131; *H. M. L. Ins. Co. v. Sixbury*, 17 Hun, 424.)

Lewis & Moot for respondent. The undertaking upon which this action is brought is a valid undertaking which has been broken, and these facts having been established by proof beyond dispute, the plaintiff was entitled to the judgment from which defendants now appeal. (Code Civ. Pro. §§ 721-724, 1237, 1346, 1348, 1351, 1352, 1353, 1354; *Yates v. Birch*, 87 N. Y. 409; *Burrall v. Acker*, 21 Wend. 605; 23 id. 606;

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Winter v. Kinney, 1 N. Y. 365; *Decker v. Judson*, 16 id. 439; *Goodwin v. Bunzell*, 18 J. & S. 441; 102 N. Y. 224; *Carr v. Sterling*, 114 id. 588; *Knapp v. Anderson*, 71 id. 466; 90 id. 347.)

PARKER, J. An examination of the record in *Goodwin v. Bunzl* (102 N. Y. 224), and a comparison of the facts disclosed by it with those now under review, leads to the conclusion that this case is controlled by it to an extent which requires the holding that the undertaking before us is a valid common-law agreement. In that case as in this the undertaking contains the following recital: "Do hereby pursuant to statute in such case made and provided undertake * * *." While the undertaking is valid and enforceable as an agreement, it can only be enforced according to its terms, and will not be given the force and effect of a statutory undertaking unless its provisions require it. This agreement provided first that the appellant "will pay all costs and damages which may be awarded against her on said appeal not exceeding \$500." Costs were awarded against the appellant on such appeal in the sum of \$119.72, and judgment therefor entered on the 9th day of June, 1884, and notice of the entry thereof duly given. Such sum with the interest thereon was, therefore, properly recoverable in this action. It further provides as follows: "And do also undertake that if the judgment so appealed from or any part thereof is affirmed, or said appeal is dismissed, the appellant will pay the sum recovered or directed to be paid by the judgment, or the part thereof as to which it shall be affirmed." If the undertaking given had been in the form provided by section 1331 plaintiff's right to recover would not admit of question, but as it is to be treated simply as an agreement between the parties we are to give to the words used their usual and ordinary legal signification. They will not be extended by implication in aid of a party who, having it within his power to protect himself by requiring a statutory bond, elected to accept something else. It will be observed that if the construction so far given to it by the courts be well founded, the

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sureties absolutely obligate themselves to pay the amount adjudged to be due and secured by the mortgage upon affirmation. So that the plaintiff, without exhausting his remedy against the property, even though it had been of sufficient value to realize the amount adjudged to be due, could have recovered in full of the sureties, while a statutory undertaking on appeal from a judgment in foreclosure only requires the payment of any deficiency which may occur upon the sale. The obligation is in the form provided by section 1327 of the Code of Civil Procedure: "Will pay the sum recovered or directed to be paid by the judgment (or order), or the part thereof as to which it shall be affirmed," and is especially applicable to such class of judgments as that section refers to, to wit: "A judgment for a sum of money, or a judgment or order directing the payment of a sum of money." It does not embrace judgments decreeing foreclosure, the delivery of possession of real property, assignment or delivery of a document, recovery of a chattel, or directing the execution of a conveyance. For such judgments sections 1328, 1329, 1330, 1331 prescribe the undertaking necessary to be given, and do not contain the language used in this agreement, and which this court is urged to declare applicable for the purposes of a recovery on an undertaking to a situation presented and provided for by section 1331. It is conceded that this undertaking could not have operated to stay proceedings on the judgment. And while it does not follow that for such reason certain terms employed in the agreement between the parties may not be so construed as to create a liability equal to or greater than that provided by the section stating the conditions necessary to compel a stay of proceedings, still the examination given to the sections to which we have but briefly alluded is of aid to the court in that it develops that at the time of the making of this agreement the statutory use of the terms here employed did not include a case where a judgment directs the sale of a specific piece of property for the purpose of making plaintiff's demand out of the avails thereof. And so far as it may be said to contribute towards showing the

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ordinary signification of the language under consideration it is in hostility to the plaintiff's position. Again, it has been determined by this court that in a decree in foreclosure there is not a "sum recovered or directed to be paid." Judge DANFORTH, speaking for this court in *Barnard v. Onderdonk* (98 N. Y. 167), said: "The action for foreclosure has resulted in a decree, but it is merely for the purpose of enforcing the lien of the mortgage as by a special execution. It is not for the payment of any sum of money, nor can it be docketed. If, after sale, there should appear to be a deficiency, it may, when other steps have been taken, be made a personal judgment; until then it is inchoate. Such is its present condition. As it now stands no 'amount of money' can be said 'to be recovered by it,' nor is it 'a final judgment or decree for a sum of money,' nor does it direct 'the payment of a sum of money.' It is final so far as it directs 'the sale of the property mortgaged' and the application of the proceeds (§ 1626), but beyond that all depends upon a contingency." This agreement was given after decree made in a foreclosure action, and the situation presented, therefore, comes directly within the language employed by Judge DANFORTH. Thus, within the ordinary legal signification of the terms used as determined by judicial construction, the parties cannot be said to have agreed that the amount decreed to be paid out of the proceeds of the sale of certain real estate should be paid by the sureties in the event of affirmance, for no sum "was recovered or directed to be paid by the judgment." The determination that an undertaking executed, delivered and accepted under the circumstances presented is a valid agreement, while required by authority, nevertheless, is in part supported by implication. Its effect should not also be extended by implication. In *Goodwin v. Bunzl* (*supra*), this question was not before the court. The judgment was in the alternative for delivery of property, or for damages, the amount thereof being determined and the issuing of execution therefor authorized.

The judgment should be reversed and a new trial granted,

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with costs to abide the event, unless the plaintiff within thirty days stipulates to modify the judgment by deducting therefrom the sum of \$518.30, with interest thereon from the 27th day of January, 1879, to September 20, 1886, in which event the judgment as thus modified is affirmed without costs of this court to either party.

All concur.

Judgment accordingly.

124 195
141 581

MARY CLUFF, Suing in Behalf of Herself and Others,
Appellants, v. HENRY S. DAY et al., Respondents.

C., by his will, gave all his property to T., who was appointed executor, in trust to convert the same into money, invest the proceeds, pay the interest to the widow of the testator during life, and, upon her death, to divide the principal among his children. In a proceeding instituted by the widow, the plaintiff herein, for a final settlement of T.'s accounts as executor, the surrogate's decree charged him with a balance then in his hands; this balance it was decreed that "the said executor retain, invest and keep invested * * * according to the trust contained in the will." The decree did not in terms discharge the executor. Plaintiff thereafter applied for a further accounting, upon which it was adjudged that T. should pay into court the principal of the estate, and to plaintiff a balance of income due her. T. failed to pay as directed, and thereupon his letters were revoked. The complaint in this action, which was upon the bond given by T. as executor, alleged and it appeared that T. did not set apart any securities and made no investment of the trust fund. The defense was that the effect of the original decree was to terminate T.'s duties as executor, and that thereafter he acted only as trustee, and for such action his sureties were not liable. *Held*, untenable; that the retention by T. of the trust fund was not necessarily the act of a trustee as distinguished from that of an executor; that he did nothing to indicate that he treated the fund as held by him in any capacity other than that in which he had received it; that the duty in respect to investment having been imposed by the will, said decree might be treated as if it contained no direction in that respect, and the only practical effect of it was a settlement of T.'s account as executor; that it was entirely consistent therewith that the fund should be retained by T. in that capacity until invested; and that, therefore, the sureties were liable for his failure to obey the subsequent decree.

Cluff v. Day (23 J. & S. 460), reversed.

(Argued December 15, 1890; decided January 14, 1891.)

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APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made April 9, 1888, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

This action was brought upon a bond executed by the defendants, as sureties, for Edward E. Tower, as executor of the will of Burgess Cluff, deceased.

The will contained these provisions :

"First. I give, devise and bequeath all my property, of every name or nature whatsoever, unto Edward E. Tower, of the town of Cohasset, in the state of Massachusetts, to be held by him in trust, nevertheless, for the following purpose and no other," to wit: To convert the property into money and invest the same in good securities, and pay the interest from time to time to his widow (the plaintiff), and after her death to divide it among his children. And lastly he appointed Tower executor of the will. The testator died in 1871, and letters testamentary were issued to Tower. In a proceeding on her application had before the surrogate for final settlement of his accounts as executor, a decree was made in November, 1873, whereby he was charged with a balance of \$12,222.98, which it was decreed "that the said executor retain, invest and keep invested * * * according to the trusts and provisions contained in said last will and testament." This amount was subsequently reduced by modification of the decree to \$10,037.98.

In 1886, on the application of the plaintiff for a further accounting in the Surrogate's Court, it was adjudged that Tower forthwith pay into the court \$10,037.98, principal of estate, and to the plaintiff, \$2,050.76, the balance due her as income, that he pay a specified amount charged against him for costs into the Surrogate's Court. He failed to pay as directed. His letters were revoked.

Further facts are stated in the opinion.

Edward B. Whitney for appellants. The decree of 1886, in terms, charged Tower as executor, and not as trustee. (*In re Cluff*, 25 Wkly. Dig. 375.) Defendants were privy to that

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decree and are bound thereby, whether erroneous or not, at least unless they can show a prior decree expressly or impliedly discharging their bond. (*Thomson v. MacGregor*, 81 N. Y. 592, 597; *Douglass v. Howland*, 24 Wend. 35; *Scotfield v. Churchill*, 72 N. Y. 565; *Annett v. Terry*, 35 id. 256; *Thayer v. Clark*, 4 Abb. Ct. App. Dec. 391; *Casoni v. Jerome*, 58 N. Y. 315; *Miller v. Montgomery*, 78 id. 282; Code Civ. Pro. §§ 399, 829, 2473, 2685, 2724; *Kelly v. Mist*, 80 N. Y. 139, 146; *Gerould v. Wilson*, 81 id. 573; *Harrison v. Clark*, 87 id. 572; *Hood v. Hood*, 85 id. 561, 578; *Deobold v. Oppermann*, 111 id. 531; *Rowe v. Parsons*, 6 Hun, 338, 344; *Bolton v. Jacks*, 6 Robt. 166; *Jenks v. Stebbins*, 11 Johns. 226; *Barber v. Winslow*, 12 Wend. 102; *Dyckman v. Mayor, etc.*, 6 N. Y. 434; *Porter v. Purdy*, 29 id. 106.) The decree of 1873 did not discharge defendants; nor have they been discharged by any matter in pais. (*Deobold v. Oppermann*, 111 N. Y. 531; Redf. Sur. Pr. chap. 19; *Glover v. Holley*, 2 Bradf. 291; *Andrade v. Cohen*, 32 Hun, 225; *In re Hood*, 98 N. Y. 363; 104 id. 107; *People v. Baker*, 76 id. 78, 83; *Hargrave v. Smea*, 6 Bing. 244; *E. N. Bank v. Kaufman*, 93 N. Y. 273, 280; *C. R. Bridge Case*, 11 Pet. 589; *Ins. Co. v. Wright*, 1 Wall. 458, 468; *Hoffman v. A. Ins. Co.*, 32 N. Y. 405, 413; *Walrath v. Thompson*, 4 Hill, 200, 202; 2 Whart. on Cont. § 670; *Foster v. Rockwell*, 104 Mass. 167; *Hobart v. Littlefield*, 13 R. I. 341, 344; *Ireland v. Livingston*, 5 H. L. Cas. 396; *Gates v. McKee*, 13 N. Y. 232, 236; Code Civ. Pro. §§ 2600, 2601; *Conkey v. Dickinson*, 13 Mete. 51.) Plaintiff is entitled to judgment irrespective of the question whether or not there was irregularity or error in the proceedings of 1886. (*Mundorf v. Wangler*, 12 J. & S. 495; *People v. Rowland*, 5 Barb. 449.) There was no error in the decree of 1886, nor any irregularity in the prior proceedings which was not cured by the decree. (Code Civ. Pro. §§ 721, 723, 2538, 2819.)

Eugene D. Hawkins for respondents. The will of testator creates a trust which does not pertain to the office and duties

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of his executorship, and appoints Edward E. Tower the trustee of such trust. (Perry on Trusts, § 262; Code Civ. Pro. § 2514; *Parsons v. Lyman*, 5 Blatchf. 170; *In re Schell*, 53 N. Y. 263; *In re Wadsworth*, 2 Barb. Ch. 381; *Johnson v. Lawrence*, 95 N. Y. 154; *Hurlburt v. Durant*, 88 id. 126; *Hall v. Hall*, 78 id. 538.) The duties and responsibilities of said Tower, as executor, terminated and his separate duties as trustee commenced in 1873, some eight years before the issuing of the citation of the special proceeding for his second accounting, and nearly thirteen years before the termination of said proceeding. (*Laytin v. Davidson*, 95 N. Y. 263; *Hurlburt v. Durant*, 88 id. 121; *Phœnix v. Livingston*, 101 id. 451; *In re Mason*, 98 id. 527; *In re Willets*, 112 id. 289; *Blake v. Blake*, 30 Hun, 471; *Johnson v. Lawrence*, 95 N. Y. 154.) Tower accepted the trusts under said will and entered upon the duties of his trusteeship as distinct and separate from his duties as executor before the proceedings were begun on which the decree of 1886 was based. (*Earle v. Earle*, 16 J. & S. 23; 93 N. Y. 110; 3 Redf. on Wills, 530; *Cocks v. Barlow*, 5 Redf. 411; *Green v. Green*, 4 id. 359; *Judson v. Gibbons*, 5 Wend. 224; *In re Gilbert*, 39 Hun, 67; *Warner v. Knowler*, 3 Dem. 212; *Seegar v. State*, 6 H. & J. 162; *White v. Ditson*, 140 Mass. 354; Code Civ. Pro. § 1337; *Hynes v. McDermott*, 91 N. Y. 451; *People v. French*, 92 id. 306.) There has been no disobedience by Tower as executor of the decree of 1873. (*Laytin v. Davidson*, 95 N. Y. 266; *West v. Van Tuyl*, 119 id. 620.) The decree of 1886 is against Tower as trustee and not against him as executor. (*White v. Ditson*, 140 Mass. 354.) The decree of 1873 has never been vacated, hence is still in force and effect, and no other account of the matters therein adjudicated could be or has been required in the Surrogate's Court. (*Brick's Estate*, 15 Abb. Pr. 12; *In re Hood*, 90 N. Y. 512; *In re Tilden*, 98 id. 434; *In re Hawley*, 104 id. 250; *Wood v. Brown*, 34 id. 343; *Patrick v. Shaffer*, 94 N. Y. 430; *Jordan v. Van Epps*, 85 id. 436; *Smith v. Smith*, 79 id. 634.) There is no evidence in the case to the effect that Tower did not have the funds of the estate in his hands at the

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time of the making of the decree of 1873. (*Ferguson v. M. L. Ins. Co.*, 22 Hun, 324; *R. P. Co. v. O'Dougherty*, 81 N. Y. 474.) If it should be held that the decree of 1886 is against Tower as executor then such decree is void for the reason that the surrogate had no jurisdiction to make it. (*In re Hood*, 90 N. Y. 512; *In re Soutter*, 105 id. 515; *Browning v. Vanderhoven*, 4 Abb. [N. C.] 166; *Thayer v. Clark*, 4 Abb. Ct. App. Dec. 391, 394; *Beams v. Gould*, 77 N. Y. 459; *Harrison v. Clark*, 87 id. 577; *Conni v. Jerome*, 58 id. 322; *Craig v. Town of Andes*, 93 id. 411.) Investments of the trust estate were to be made by Tower as trustee and not as executor. (*Laytin v. Davidson*, 95 N. Y. 263; *Johnson v. Lawrence*, Id. 154.) The surrogate had no authority or jurisdiction to combine in one proceeding and in one decree a judicial settlement of an executor or trustee's account and the removal of an executor or trustee. (Code Civ. Pro. §§ 2603, 2724; *Ashley v. Lamb*, 50 Hun, 568.) The sureties on the executor's bond are not liable for his acts as trustee where his trusteeship is distinct and separate from his executorship. It is the same as if a third person had been appointed trustee. After his executorship ceases, if he should die, an administrator with the will annexed could not take charge of the trusts, but a new trustee would have to be appointed. (Perry on Trusts, § 262.)

BRADLEY, J. The action was brought under section 2609 of the Code of Civil Procedure, and the plaintiff in the complaint alleges the decrees of the surrogate made upon the accounting of Tower in 1873 and in 1886, and that at the time of the former he did not set apart anything to represent the balance charged against him by the decree, and made no investment of the trust fund pursuant to it, and that he disobeyed each and both of such decrees of the surrogate. The defense rests mainly upon the alleged ground that the effect of the decree of 1873 was to terminate Tower's duties as executor, and that thereafter his functions were those of trustee only, in respect to the estate, and, therefore, the defendants as

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sureties in his bond as executor were no longer responsible for his administration of it. If these premises are correct, such conclusion necessarily follows, because the decree of 1873 remains unimpeached, and as between the parties is conclusive as to the matters within the scope of its determination. That decree purports to and does represent a final accounting of the executor as such, and by it he was charged with a balance, as afterwards modified, of upwards of \$10,000. The question presented here is whether the executor as such was discharged by the decree of 1873. If he was, the decree of 1886 must be treated as made upon an accounting by Tower as trustee, and if not so discharged it was within the jurisdiction of the surrogate to require and to take his accounting as executor, although it would not go back of the former decree as to the state of the account, but would have relation to the time and transactions subsequent to it. (*In re Hood*, 90 N. Y. 512; *In re Soutter*, 105 id. 514.) And then liability upon the bond would arise from the failure of the executor to obey the decree of 1886. The former decree did not in express terms discharge the executor. The investment and its continuance would seem to call into exercise the functions of a trustee rather than those of an executor; and it may be that it was in view of that purpose that he was directed to retain it, but his retention of it was not necessarily the act of a trustee as distinguished from that of an executor. The question became one of construction and effect of that provision of the decree, and upon that subject it may be well to consider the question in the light of the authorities having some relation to it. In *Laytin v. Davidson* (95 N. Y. 263), the will referred to contained provisions requiring the exercise of functions executorial and those of a trustee. A final accounting of the executors was had before the surrogate, and by the decree the amount of the capital of the estate remaining in their hands was determined, and they were directed to retain and hold it "as trustees under the last will and testament" of the testator. The court, in the opinion delivered by Judge ANDREWS, said: "The decree did not in terms discharge the executors, but this was the reasonable intend-

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ment and legal effect of the direction that they should retain and hold the whole balance of the estate as trustees under the will. The fact that the trustees have not made an actual division of the trust fund into shares as directed by the will, does not, we think, change the question. * * * The executors have upon a final accounting as executors been discharged as such. The fund has become exclusively a trust fund under the will to be held by the trustees," etc. Our attention is also called to *Matter of Estate of Hood* (98 N. Y. 363), where there was a final accounting of the executors, and the decree of the surrogate directed "that the balance of said moneys, being the sum of \$53,710.69, said executors shall hold and invest pursuant to the powers in said last will and testament," and it was held in a proceeding to revoke the letters testamentary of one of the executors, that he as such was not discharged by that decree. And in the opinion of the court, delivered by Judge MILLER, it was said that in the absence of any direction in the will that the executors should become trustees, no reason exists why the executor, whose account was settled, should not continue to act in that capacity. "When the decree was made he was clearly an executor and held these funds in his hands and was liable for the same as such," and "even if, under the will it was possible for the executor to have become a trustee, he could not have done so until there had been a final accounting and a discharge by decree of the surrogate from his position as executor, or by direction in the decree that he take and hold the property as trustee as distinct and separate from his functions as executor." And added that "at the time of the decree the executors had not fully performed their functions, and their duties had not terminated. This fact is a complete answer to the position that the executors became trustees after the decree of the surrogate." And remarked that the *Laytin* case was not adverse to such views as "trusts were there created under the will, and the decree of the surrogate directed the property to be held by the executors as trustees." The ground of distinction founded solely upon the decrees of the surrogate in the two cases cited, seems

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to be in the use in the one and absence in the other of the word "trustee," as relating to the character in which they should retain and invest the fund. But back of those decrees and in reference to the wills, it is said that a period of time was contemplated by the testator in the *Laytin* case when the duties of the executors as such would end and they should assume the character of trustees only, which was not applicable to the will in the *Hood* case. The fact, however, remains that in the latter case the direction to invest applied to all the property remaining in the hands of the executors, and allowance was made to the executor Hood of his commissions.

The *Matter of Hood* (104 N. Y. 103) again came up on appeal from an order directing him as late executor to render an account before the surrogate; and in referring to the former review Judge FINCH in speaking for the court said: "We then held, passing by the inquiry whether under the will it was possible for him to exchange the character of executor for that of trustee, that he had not effected such exchange, and remained executor only, and removable as such for his misconduct in that capacity. We pointed out that on the accounting in 1869, he was not discharged, was not directed to hold the remaining assets as trustee, was not credited with such transfer and his account thereby balanced, but the decree entered directed as to the assets remaining that 'the said executor shall hold and invest pursuant to the powers and directions contained in said last will and testament.' There had been no payment to the defendant as trustee, no new account opened and kept in the new capacity, and no separation or division of the fund allotting to the beneficiaries their exact and specific proportions."

These views tend to illustrate the principal of the decision of the court on the former review and they seem to indicate that to some extent at least the distinction between it and the *Laytin* case was in the direction given by the surrogate's decrees.

In *Matter of Willets* (112 N. Y. 289), it was held that it was not within the contemplation of the will that the two

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functions of executors and trustees were to co-exist, but that those of the former were to first be executed and the latter to follow. The surrogate settled their accounts as executors and ordered them out of the "balance of principal in their hands to pay to themselves as trustees" a sum mentioned. It was held that their functions as executors then terminated, and they assumed those of trustees. That case came fairly within the doctrine of the *Laytin* case.

In *Johnson v. Lawrence* (95 N. Y. 162), where the indication in the will was that the two functions might co-exist, and that no separation of them was contemplated, the court said that "taking the adjudged cases together, they appear to establish that to entitle the same persons to commissions as executors and as trustees, the will must provide, either by express terms or by fair intendment, for the separation of the two functions and duties, one duty to precede the other, and to be performed before the latter is begun or substantially so performed * * * and that where the will does so provide for the separate and successive duties, that of the trustee must be actually entered upon and its performance begun either by real severance of the trust fund from the general assets, or a judicial decree which wholly discharges the executor and leaves him liable only as trustee." And on the subject see *Hall v. Hall* (78 N. Y. 535); *In re, etc., Mason* (98 id. 527); *Phœnix v. Livingston* (101 id. 451).

In all these cases, except that of *Hood*, the controversies were in respect to commissions and whether the executors and trustees were entitled to them in both capacities, and more especially in the latter. And to entitle them to commission also as trustees, it must appear by the will that the separation of the two functions was clearly intended by the testator, and has been effected, or that the office of executor has been terminated by the discharge of him as such by the decree of the surrogate made upon his accounting, whereby the matters of the testamentary trust solely are devolved upon him as trustee. In the present case, the trial court found that at the time of the accounting, in 1873, Tower had in his hands the money

charged in the decree. This must be assumed, as the fact does not necessarily appear to the contrary, and, therefore, no charge for any devastavit prior to that time arises for consideration. And as the executor was not by the express terms of the decree discharged, the determination of the question presented, is dependent upon the nature of the functions which he was, after the decree, permitted to exercise in respect to the fund. It may be observed that all the property of the testator was devised to Tower "to be held by him in trust," and he was directed to convert into money, invest it, pay the income to the plaintiff and after her death to divide it among his children. Tower was appointed executor to execute the provisions of the will. The duty of investing the fund and disposing of the income, and finally of the principal, was that of a trustee. But Tower took the estate in his hands as executor. And the decree directed "that the said executor retain, invest and keep invested the balance remaining in his hands * * * according to the trusts and provisions contained" in the will. Those provisions were for investment, payment of income and final distribution. He could retain the fund as executor, as directed by the decree, although the investment and what followed would be within the functions of a trustee. He made no investment and did no act indicating that he treated the fund as held by him in any capacity other than that in which he had received it. It is true that, as a general rule, when the same hand is to pay and receive, what is required by law to be done to accomplish it, will be deemed done, but it is entirely consistent with the decree that the fund be retained by him as executor until he should take an opportunity to invest it, and the transfer to him as trustee would be evidenced by the investment. The decree did not, as in the *Willetts* case, direct him as executor to pay the fund to himself as trustee, nor, as in the *Laytin* case, to hold it as trustee. The only practical effect of the decree was a settlement of the accounts of the executor, and it would have had the same effect for all the purposes to which it was entitled as made, if it had stopped with the adjudication of the balance against him as such, and directed the

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payment of the costs and expenses of the proceedings as it did. The duty in respect to the investment, etc., was given by the will. So the case may be treated as if no direction had been given by the decree in that respect. Could it be effectually said that from the time of a mere adjudication of the settlement of the accounts of the executor, he ceased to hold the funds as such? It seems quite clearly not until he had in some manner done something to change his relation to it. In such case, as said by Judge FINCH in *Johnson v. Lawrence*, the duties of the trustee must be actually entered upon and performance begun, or the executor be wholly discharged by the decree of the surrogate. Neither was done in this instance; and, assuming that the fund remained in his hands at the time of such accounting, nothing appears to divest him of the relation of executor to it. The decree does not import his discharge as such; nor is a forced or doubtful construction justified for the purpose of giving to it such effect. In the *Phoenix* case, the trustees actually entered upon the performance of their duties as such. And as the executor in the case at bar was not discharged by the decree, nothing appears to warrant the conclusion that his functions as executor was terminated in respect to the fund. If these views are correct, the surrogate had jurisdiction to take the accounting of the executor and make the decree of 1886, and it must be treated as made upon the accounting of Tower as such. This is consistent with the provisions of that decree, and it was in that view that the application was entertained by the surrogate for the revocation of his letters testamentary, and decree made accordingly. The exceptions, therefore, to the finding of the trial court that the executor was discharged by the decree of 1873, and to the conclusions of law which followed were well taken. These views render it unnecessary for the purposes of this review to consider any other question.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

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167	439

GEORGE POOLEY, Respondent, v. THE CITY OF BUFFALO,
Appellant.

It seems that when the alleged illegality upon which relief against an assessment is founded is patent upon the record on which the person claiming under it must rely to support his claim, the owner of the land is not entitled to affirmative relief to remove it, as in the legal sense it is not a cloud upon the title, or prejudicial to him.

So also, although the infirmity may not appear on the record, if the claimant cannot establish his claim without developing the defect which will defeat it, the owner of the land cannot have affirmative relief.

The same principles apply to an action having in view the recovery of money paid by the owner upon an assessment unless it was made by those having no jurisdiction to make it, or unless the payment was made under coercion in fact.

It seems, also, where the charter of a municipality provides that it shall be presumed that every assessment made is "valid and regular, and that all the steps and proceedings required by law were taken and had until the contrary shall be made to appear," this presumption entitles a person whose land is assessed to relief, when the illegality of the assessment is shown, and it rests in something *de hors* the record.

Phelps v. Mayor, etc. (112 N. Y. 216), distinguished.

In an action to recover money paid upon an assessment on property in Buffalo the court found that certain persons whose lands were assessed filed with the city clerk objections to the roll, and that he reported the filing of such objections to the common council, but did not lay the roll or objections before that body, nor did it at any time have or consider such objections as required by the city charter (§ 14, tit. 6, chap. 519, Laws of 1870). By the charter (§ 36, tit. 7) it is declared that it shall be presumed that every assessment made under it is valid and regular, and that all proceedings required by law were taken unless the contrary appears. *Held*, it could not be assumed that any of such objections were made by the plaintiff or any of his assignors, or that they or any of them went to the validity of the assessment; that as the burden was upon plaintiff to prove the facts entitling him to relief, it was necessary to show that he was or may have been in some manner prejudiced by the failure of the common council to consider the objections made; and that in the absence of any evidence justifying a finding of some fact showing the illegality, the action was not maintainable.

(Submitted January 14, 1891; decided January 22, 1891.)

THIS was a motion by plaintiff for a reargument.
The case is reported in 122 N. Y. 592.

Opinion of the Court, per BRADLEY, J.

Tracy C. Becker for motion.

George M. Brown opposed.

BRADLEY, J. The able argument presented by counsel in support of the motion requires the statement of some reasons for its disposition. The general principles applicable to cases in which is involved the question of equitable relief of the character of that sought in this action are quite well settled. The controversy in this action has relation to an assessment upon the lands of plaintiff and others to pay the expense of a local improvement in the city of Buffalo. Upon that subject it may be said that when the alleged illegality upon which relief against an assessment is founded is patent upon the record upon which the person claiming under it must rely to support his claim, the owner of the land is not entitled to affirmative relief to remove it, because it condemns itself, and in the legal sense is not a cloud upon the title, nor prejudicial to him; and although the infirmity may not appear on the record, if the person claiming any right under the assessment cannot effectually do so for the reason that in his evidence to establish it he must develop the defect which will defeat his claim; then the owner of the land cannot have affirmative relief for the same reason, and the same principles are applicable to an action having in view the recovery of money paid by him upon an assessment, unless it was made by those having no jurisdiction to make it, or unless the payment was caused by coercion in fact. The plaintiff's counsel contends that this case falls within neither of those classes, but in that which permits a recovery and relief when the claimant's right presumptively arises upon the production of the instrument, which he has received as the evidence of it and the defeat of that which it purports to give is matter of defense, and such defense is dependent upon extrinsic facts. As urged, the presumption given by the Buffalo city charter that every assessment made under it is valid and regular and that all the proceedings requisite were taken and had until the contrary appears, entitles a

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person whose land is assessed to relief against it when the illegality of the assessment rests in something *de hors* the record. And in respect to such presumption the present case is distinguishable from that of *Phelps v. Mayor, etc.* (112 N. Y. 216). In the charter of the city of New York, upon which the latter case arose, the presumption of regularity does not arise until the lease is made pursuant to a sale of land on non-payment of an assessment. But in no case can the purchaser be in any situation to assert any claim to the property founded upon his purchase until it is perfected by lease or conveyance, as provided by the statute, pursuant to which the assessment and sale are made. And the maintenance of an action by the owner of the property for relief against an assessment before the demise or conveyance is perfected, must be dependent upon the legal presumption given by law to the assessment or to the instrument subsequently made evidencing or perfecting the sale, and in the latter case upon well-founded apprehension that the steps productive of such presumption would be taken and that it would arise. And then such existing or apprehended presumption would not support the action unless the facts which constituted the illegality of the assessment were extrinsic the record. There is a further distinguishing feature between the statutes upon which the *Phelps* case and the present one arose as to the extent of the presumption. In the former the provision is that the lease "shall be presumptive evidence that the sale and all proceedings prior thereto from and including the assessment * * * were regular and according to the provisions of the statute," and in the other the provisions are that it shall be presumed that every assessment made is "valid and regular, and that all the steps and proceedings required by law were taken and had until the contrary shall be made to appear," and that the declaration of sale, which is effectual as a lease, "shall be presumptive evidence that the assessments * * * were legally imposed, that due proceedings to authorize the sale were had, and that the sale was regular." It is suggested that the *Phelps* case is distinguishable from and not applicable to this case, because, while the statutory

presumption applicable to the latter embraces not only the assessment, but all the proceedings upon which it was founded, the presumption in the New York city charter only reaches back to and includes the assessment, and, therefore, the purchaser to support the claim would be required to prove the validity of the resolution of the common council pursuant to which the assessment was made. That may be so, but the decision of the *Phelps* case was not placed on that ground. It was there distinctly held that the plaintiff was chargeable with notice of the defective resolution, and for that reason could not recover back the payment made on the assessment. That was the sole ground upon which the determination was made. And Judge GRAY, in speaking for a unanimous court, said: "For the purposes of this case the sole question which we shall consider is, whether this ordinance on its face carried with it notice of the illegality of the corporate act, not whether matters *de hors* the record otherwise established the invalidity of the assessment. If the ordinance was on its face void then the plaintiff cannot plead ignorance of the law in justification of the payment. The principle is elementary that "a party cannot recover back money paid upon the ground that he supposed that he was bound in law to pay it," and added that "when the ordinance or the resolution directing a local improvement, is essentially illegal as violating in its provisions the statutory power conferred upon the common council, the payment of an assessment imposed for the expense incurred under its authority, is a mistake of law, and in such case relief cannot be granted." The doctrine of that case is, therefore, applicable to the resolution of the common council directing the work of improvement. But it is unnecessary for the purposes of this case to seek to apply the rule announced in the *Phelps* case to the vote as recorded, adopting the resolution. The burden was with the plaintiff to prove a substantial illegality in the proceedings invalidating the assessment to support his action. (*Remsen v. Wheeler*, 121 N. Y. 685.) As the record of the common council appears here, the resolution was adopted by a two-thirds vote, as well as by the vote in the affirmative of

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two-thirds of the whole number of the members of that body. Such record alone viewed without or with reference to the city charter shows an adoption of the resolution by the requisite vote, and if it was in fact otherwise, its impeachment was for the plaintiff to prove.

But the main objection has relation to the disposition made so far as represented by such record of the objections made to the assessment-roll prior to its confirmation. Although it does not appear in the evidence by whom the objections were made or that they were made by any person interested in it, no question in that respect arises because no exception was taken to the finding of the trial court on that subject. We did not nor did we intend on the review of the judgment to express any opinion upon the question whether it appeared by the record that there was any substantial irregularity or illegality in the proceedings of the common council in that respect affecting the validity of the assessment, but treated what did appear there as not *de hors* the record of the assessment. If this view in its application to this case may be regarded as in advance of the rule upon the subject, there is a further reason why a new trial was properly granted. The trial court found that the work was not ordered by a two-thirds vote of all the members of the common council. In the view already expressed upon that question there was no evidence to support such finding, and the exception to it was well taken. And although that finding, if sustained, would support the conclusion of law, it does not appear whether or not the latter was placed upon that ground; and if there was any other finding which would necessarily support such conclusion, the error arising upon that exception might be disregarded. The question, therefore, arises upon the finding that certain persons whose lands were assessed in the assessment filed with the city clerk objections to the roll, and that the city clerk reported to the common council that objections had been filed to the roll, but did not lay such roll or such objections before that body, nor did it at any time hear or consider such objections. It cannot be assumed that those or any of such objections were made

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by the plaintiff or any of his assignors, or that the objections or any of them went to the validity of the assessment. In view of the fact that the burden is upon the plaintiff to prove the facts entitling him to relief, it must be made to appear that he was or may have been in some manner prejudiced by the failure of the common council to consider the objections which were made. That may have been dependent upon their nature or pertinency. If they were founded solely upon the supposed prejudice to those making them, and the objections not against the legality of the assessment, it would not necessarily concern the plaintiff. It cannot, without some evidence tending to prove what the objections were, be presumed that their nature was such that the consideration of them may have in any view resulted beneficially to the plaintiff. And this is so because it may be seen that objections of such nature may have been made that the consideration of them could not have inured to the advantage of any person assessed other than those making them, and consequently such other persons could not be prejudiced by the omission to consider them. The character of the objections not appearing, their pertinency cannot be the subject of consideration. It seems to follow that the conclusion of law found by the court was not supported by the finding as made on the subject of the objections filed with the city clerk to the roll. The defendant excepted to the finding that the roll or objections were not laid before, nor the objections heard or considered by, the common council. The only evidence bearing upon that fact appears in the record of the proceedings of that body. And whether that was such or sufficient to establish the facts so found, it is, in the view here taken, unnecessary to determine. The negative of the fact is not there stated, and whether it is necessarily excluded by what does there appear may be questionable. And inasmuch as the clerk of the common council called its attention to the objections, and assuming they were such that the duty to consider them was essential to the validity of the assessment, the question may arise whether or not the presumption may not be permitted that it was done. Whatever they were, it appears

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by the act of confirmation of the roll that the objections were overruled.

The motion for reargument should be denied.

All concur, except HAIGHT, J., not voting.

Motion denied.

124	219
142	82
124	212
s 147	460
j 147	468
124	212
s 152	461
124	212
d166	341

SARAH M. MYGATT et al., as Surviving Trustees, etc., Respondents, v. GEORGE S. COE, Appellant.

Covenants of seizin and of right to convey, in a deed of real estate executed by one who has no title, are broken by the delivery of the deed and become choses in action; they do not run with the land, and so, do not pass to subsequent grantees, without an assignment of the cause of action.

Covenants of warranty and of quiet enjoyment entered into jointly by the owner of the fee and a stranger to the title, who does not assume any title in himself or right to convey, do not run with the land as against the stranger, and are not available in favor of a subsequent grantee who holds no assignment of the cause of action arising from a breach of the covenants. (BRADLEY, HAIGHT and BROWN, JJ., dissenting.)

Defendant and his wife joined in a deed of real estate which one R. had assumed to convey to her and which was in her possession. The deed contained a joint covenant, on the part of defendant and his wife, that she was lawfully seized of an estate in fee, also joint covenants of warranty and of quiet enjoyment. F., the grantee, entered into possession and thereafter executed a mortgage upon the premises. Subsequently L., who was in possession claiming title through various mesne conveyances under said deed, was ousted from the premises under a judgment in an action of ejectment brought by persons claiming title paramount to that conveyed by R. to defendant's wife. Thereafter plaintiffs, who were the holders of said mortgage, foreclosed the same, sold and bid in the premises under the judgment in the foreclosure suit. Upon their application the judgment of ejectment was opened and they were allowed to come in and defend, but failed in their defense and judgment was entered against them; they never at any time had possession of the premises. In an action brought by them upon the covenants in the deed to recover the amount of the mortgage, *held* (BRADLEY, HAIGHT and BROWN, JJ., dissenting), that the covenants did not run with the land as against defendant who was a stranger to the title; that he was not estopped from claiming that he occupied that position; and that, therefore, the said covenants were not available against him in favor of plaintiffs, no assign-

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ment of the cause of action arising from the breach having been made to them.

The authorities bearing upon the question as to what covenants run with land collated and discussed.

Dickinson v. Hoome's Admr. (8 Grat. 358, 402); *Lydick v. B. & O. R. R. Co.* (17 W. Va. 427), so far as they are authorities opposed to these views, disapproved.

Packenham's Case (Y. B. 42 Edw. III, 3), distinguished.

Mygatt v. Coe (44 Hun, 31), reversed.

(Argued December 10, 1890; decided January 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 31, 1887, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This was an action to recover damages for an alleged breach of covenants.

On the 15th day of February, 1856, Ebenezer L. Roberts acquired through Charles Leech, a referee, an unincumbered estate, in fee simple, in the premises described in the complaint, and, to secure the payment of \$5,500 of the purchase-price, executed and delivered on that day a mortgage on the premises to Leech, as referee, which was duly recorded on the next day and became the first lien. May 15, 1856, Ebenezer L. Roberts and his wife conveyed the premises, in fee simple, subject to said mortgage to William Tasker, who, on the same day, executed and delivered a mortgage on said premises to secure the payment of \$1,800 to Ebenezer L. Roberts, which was duly recorded on the next day and became the second lien. October 1, 1856, Tasker conveyed the premises, in fee simple, to Ephraim H. Howell by a deed dated that day, which recited a consideration of \$12,000, that it was subject to the first mortgage, but made no reference to the second mortgage, and contained covenants of seizin against incumbrances, of warranty and for further assurance. This deed was duly recorded December 4, 1856. September 18, 1857, Ebenezer L. Roberts began an action against William Tasker, the mortgagor, Ephraim H.

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Howell (then the owner of the fee) and Cecilia A. Howell, his wife, to foreclose his said mortgage. The summons was duly and personally served on William Tasker and Cecilia A. Howell, but before it was served on Ephriam H. Howell, and on the 19th of October, 1857, he disappeared, and for some months it was believed that he had left the state. In November, 1857, the summons was ordered served upon him by publication, and the statutory requirements were, in form, complied with. Howell had not left the state, but committed suicide (as was discovered in March, 1858) on the 19th of October, 1857. He died intestate, seized in fee of said premises, and left five infant children, who were his heirs at law, and a widow. February 17, 1858, a judgment of foreclosure and sale was entered in this action, and March 13, 1858, the lands were sold and assumed to be conveyed under said judgment to Ebenezer L. Roberts. These proceedings were had in ignorance of the fact that Howell was dead. Roberts recorded his deed, took possession under it, and July 15, 1858, he paid off the first mortgage for \$5,500 and assumed to convey the premises to Almira S. Coe by a deed which she duly recorded, and she immediately entered into possession of the premises thereunder, and continued therein until April 12, 1867, when, in consideration of \$18,500, she assumed to convey the premises to Nancy Fisher by a warranty deed, in which defendant George S. Coe, her husband, joined. By this deed Almira S. Coe and George S. Coe jointly covenanted: (1) That Almira S. Coe was seized of the premises. (2) That she had good right to convey them. (3) That the premises were unincumbered. (4) That the grantee should quietly enjoy the premises. (5) That they would give further assurance. (6) That they, their heirs and representatives would forever warrant and defend the grantee, her heirs and assigns, against all persons lawfully claiming or to claim the same. The grantee recorded her deed and entered into possession thereunder, and December 21, 1869, assumed to mortgage the premises to the plaintiffs to secure the payment of \$15,000, which mortgage was duly recorded. On the 19th of April, 1871, Nancy Fisher assumed to convey the premises in fee to

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one Henry W. Fuller, who entered into possession under his deed and remained therein until November 11, 1874, when he assumed to convey said premises in fee to Clara B. Leavitt, who entered into possession under her deed. In 1878 the heirs at law of Ephraim H. Howell recovered the land by an action in ejectment and ousted Clara B. Leavitt. Thereafter the plaintiffs began an action against Nancy Fisher, Charles J. Fisher, her husband, Henry W. Fuller, Clara B. Leavitt and James M. Leavitt, her husband, for the foreclosure of their said mortgage for \$15,000, which resulted in a judgment of foreclosure June 5, 1879, and, pursuant to this judgment, the premises were assumed to be sold and conveyed August 14, 1879, to the plaintiffs for \$2,000, that being the highest sum bidden at the sale. (85 N. Y. 30.) In November, 1879, the judgment of ejectment was opened and the plaintiffs in this action were allowed to come in and defend, and on the 27th of January, 1883, a judgment was entered in the ejectment action against these plaintiffs, which was affirmed by the Court of Appeals April 29, 1884 (95 N. Y. 617), and May 10, 1884, the judgment of the Court of Appeals was made the final judgment of the court of original jurisdiction. The plaintiffs never, at any time, had possession of the premises.

On January 3, 1884, Almira S. Coe died, and in November of that year this action was begun to recover the amount of the mortgage given by Nancy Fisher to the plaintiffs, with interest thereon from May 1, 1878, on the grounds that the covenants of seizin, for quiet enjoyment and general warranty were broken. The case was tried before the court without a jury, which ordered a judgment for the plaintiffs for the amount due on the mortgage, principal and interest.

Wm. S. Cogswell for appellant. There was no privity of estate between appellant and Nancy Fisher. He never had nor claimed any title or estate in the premises in question. Therefore his covenants that his wife was seized for quiet possession, etc., did not run with the land; they were personal covenants between appellant and Nancy Fisher, and could not

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pass either by her mortgage or conveyance of the premises. (2 Washb. on Real Prop. 284; *Cole v. Hughes*, 54 N. Y. 444, 448; *Snoddy v. Leavitt*, 105 Ind. 357; *Gibson v. Holden*, 155 Ill. 199.) If it be held that appellant's covenants ran with the land, then the respondents never acquired any right to them, either by the mortgage from Nancy Fisher or by the deed from the sheriff of Kings county. (Tiedman on Real Prop. § 860; Willard on Real Estate, 414; *Adams v. Conover*, 87 N. Y. 422, 430; *Trimm v. Marsh*, 54 id. 599, 607; *Odell v. Montrose*, 68 id. 506; *Howell v. Leavitt*, 95 id. 621, 622; *Dunning v. Leavitt*, 85 id. 30, 36; Code Civ. Pro. § 1632; 4 Kent's Comm. 515, 516; Rawle on Cov. 318; Washb. on Real Prop. 470; *Bedloe v. Wadsworth*, 21 Wend. 120; *Shattuck v. Lamb*, 65 N. Y. 49; Sedg. on Dam. 174; *Adams v. Conover*, 22 Hun, 427; 87 N. Y. 422.) If it held that the respondents were entitled to recover, the court below erred in admeasuring damages. (Tiedman on Real Prop. § 861; *Peters v. McKeon*, 4 Den. 546; *Staats v. Ten Eyck*, 3 Caines, 111; *Kinney v. Watts*, 14 Wend. 38; *Kelly v. Dutch Church*, 2 Hill, 115.)

Sidney S. Harris for respondents. The plaintiffs as purchasers and grantees under the foreclosure sale acquired all the right, title and interest of Nancy Fisher, the mortgagor, and all the rights, title and interest they had themselves as mortgagees at the date of the mortgage. (*Rector, etc., v. Mack*, 93 N. Y. 488; *Phyfe v. Riley*, 15 Wend. 255; *Hubbell v. Moulson*, 53 N. Y. 227; *Wilson v. Wilson*, 32 Barb. 343; 1 Jones on Mort. § 13; Thomas on Mort. 16; *White v. Rettenweger*, 30 Ia. 268-271; *Andrews v. Wolcott*, 16 Barb. 25; *Kellogg v. Wood*, 4 Paige, 578; *Howell v. Dunning*, 90 N. Y. 241; *Vroon v. Ditmar*, 4 Paige, 526; *Brainard v. Cooper*, 10 N. Y. 358; *Packer v. R. & S. R. R. Co.*, 17 id. 288; 2 Jones on Mort. § 1654; *White v. Evans*, 47 Barb. 179.) If it had been true that the plaintiffs derived their rights upon the covenants through Mrs. Leavitt and that at that time the covenants were broken, the plaintiffs would still be entitled to

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maintain this action as the real parties in interest. (*Andrews v. Appel*, 22 Hun, 429; *Roberts v. Levy*, 3 Abb. [N. S.] 316; *Schofield v. H. Co.*, 32 Ia. 317; *Trustees v. Lynch*, 70 N. Y. 451; *Ernst v. Parsons*, 54 How. Pr. 163; *Robert v. Levy*, 3 Abb. [N. S.] 316; 4 Kent's Comm. 472; Code Civ. Pro. § 449.) If it were necessary, it would be successfully claimed that the covenants inure to the benefit of the plaintiffs as mortgagees. (*White v. Whitney*, 3 Metc. 81; Rawle on Covenants, 316, 317, §§ 216, 218; *Spencer's Case*, 1 Smith's L. C. 199; *Kane v. Sanger*, 14 Johns. 83.) Where the grantee has been unable to obtain the possession of premises on account of a paramount outstanding title and has in fact never been ousted from the possession, he may maintain an action for the breach of the covenant. (*Shattuck v. Lamb*, 65 N. Y. 499; *Scriven v. Smith*, 100 id. 447; Rawle on Covenants [5th ed.], § 139; *Dewall v. Craig*, 2 Wheat. 45; *Whitney v. Dinsmore*, 6 Cush. 124.) The action is properly brought by the plaintiffs against the defendants. (*Preiss v. Le Poidevin*, 9 N. Y. S. R. 700; *Withy v. Mumford*, 5 Cow. 137; *Suydam v. Jones*, 10 Wend. 184; *Ford v. Wadsworth*, 19 id. 337; *Boddee v. Wadsworth*, 21 id. 120, 124; 3 Washb. on Real Prop. [3d ed.] 662, §§ 19, 20, 21; *Andrews v. Walcott*, 16 Barb. 21; *Hunt v. Amidon*, 4 Hill, 345; *Withy v. Mumford*, 5 Cow. 137; *Burt v. Dewey*, 40 N. Y. 286.) The defendant having joined with his wife in the deed to Fisher, which contained the usual full covenants of title, is liable on the covenants. (*Whitbeck v. Cook*, 15 Johns. 485; 2 N. Y. Leg. Obs. 209; 61 Ind. 367; Chitty on Plead. 48, 50; *Grant v. Shurter*, 1 Wend. 148; *Greenwault v. Davis*, 4 Hill, 693; *Grant v. Townsend*, 2 Den. 336.) The judge correctly held that plaintiffs were entitled to recover the amount of their mortgage with interest. (*Staats v. Ten Eyck*, 3 Caine, 112; *Dominick v. Lockwood*, 10 Wend. 142; *Pitcher v. Livingston*, 4 Johns. 1; *Bennett v. Jenkins*, 13 id. 50; *Sweet v. Bradley*, 24 Barb. 549; *Doughty v. Duvall*, 9 B. Monroe, 57; *Rickert v. Snyder*, 9 Wend. 420; *White v. Whitney*, 3 Metc. 81; *Withy v. Mumford*, 5 Cow. 137; *Baxter v. Ryan*.

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13 Barb. 281; *Burt v. Dewey*, 40 N. Y. 283; *Cox v. Henry*, 32 Penn. St. 82; 1 Sedg. on Dam. 333; *Flint v. Headman*, 36 Vt. 210; *Harden v. Larkin*, 41 Ill. 413; 2 Sutherland on Dam. 264, 280; *Donohue v. Emery*, 9 Metc. 68; *Wilson v. Wilson*, 5 Foster, 236.)

FOLLETT, Ch. J. Mrs. Fisher, had she been evicted and brought her action in the life-time of Mrs. Coe, could have recovered her damages of this defendant, because he had covenanted directly with her, under his seal, that he would indemnify her for the damages sustained by an eviction. Though Mrs. Coe died before this action was begun, the question of the liability of a surviving joint contractor (*Risley v. Brown*, 67 N. Y. 160; *Randall v. Sackett*, 77 id. 480) is not raised by the record, and it was conceded on the argument in this court that it does not appear whether the defendant received the whole or any part of the consideration of the deed. Mrs. Coe having no title when she conveyed to Mrs. Fisher, the covenants of seizin and of right to convey were broken by the delivery of her deed and became choses in action, which were not transferred to the subsequent grantees, or, in other words, these covenants did not run with the land. (*Greenby v. Wilcocks*, 2 Johns. 1; *Abbott v. Allen*, 14 id. 248; *M' Carty v. Leggett*, 3 Hill, 134; *Mott v. Palmer*, 1 N. Y. 564; *Chapman v. Holmes*, 10 N. J. L. 20; 2 Dart's Vend. [6th ed.] 881; Rawle Cov. [5th ed.] §§ 69, 202.) The plaintiffs must recover, if at all, for a breach of the covenants of warranty and of quiet enjoyment.

The important question in this case is, whether covenants of warranty and of quiet enjoyment entered into jointly by the owner of the fee, or one assuming to be its owner, and a stranger to the title, run with the land as against the stranger, and are available in favor of a subsequent grantee who holds no assignment of the cause of action arising from the breach.

Had the plaintiffs been able to allege and prove a deed in which the defendant and his wife had assumed to grant, and had they delivered possession of the premises described and

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had covenanted that they were lawfully seized, had good right to convey, and that they would forever warrant and defend, the plaintiffs might, by the aid of the doctrine of estoppel, have prevented this defendant from proving, and the court from finding, that he never had any title, estate or interest in the land. But the parties agreed, and the court found that Roberts assumed to convey the premises to Almira S. Coe. The plaintiffs alleged, which the defendant did not deny, and proved that the defendant and his wife covenanted that she was lawfully seized of an absolute and indefeasible estate of inheritance, in fee simple, in the premises and had good right and lawful authority to convey them. Our attention is called to the finding that the defendant and his wife joined in a deed purporting to convey the land in fee simple to Nancy Fisher. This finding is not inconsistent with the findings and facts admitted already referred to. It is not therein found that this defendant assumed to convey any estate in the premises, nor is it found that he covenanted that he or they were seized and had a right to convey the premises, nor can we infer such a fact in the face of the allegation in the complaint that Mrs. Coe assumed to have the entire title to the premises, and, in legal effect, that the defendant was a stranger to it. Facts admitted by the pleadings have the same force as facts found. If the facts found and admitted are inconsistent, the appellant is entitled to rely upon those most favorable to him. It is unfortunate that the deed which fixes the rights of these parties is not contained in the case, but if a new trial is had this defect will be remedied, and the exact connection of this defendant with the conveyance will be made clear.

“There are three manner of privities, viz.: (1.) Privity in case of estate only. (2.) Privity in respect to contract only. (3.) Privity in respect to estate and contract together.” (2 Sugd. Vend. *714; 4 Cruise’s Dig. *376; Greenleaf’s ed. 458.) The term privity in estate denotes mutual or successive relationship to the same rights of property. (*Stacy v. Thrasher*, 6 How. [U. S.] 44-59; Green. Ev. §§ 189, 523; Big. Est. [6th ed.] 347.) “There is a certain privity between the grantor

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and grantee of the land. It is not the privity arising upon tenure, for there is no fiction of fealty annexed. It is, however, the same sort of privity which enables the grantee of a purchaser to maintain an action upon the covenants of title given to his vendor; and it is moreover a privity of the same nature with that which obtains between the grantor and grantee of terms for life and for years." (*Van Rensselaer v. Hays*, 19 N. Y. 68, 91.)

There was no mutual relationship between the defendant and Nancy Fisher or her grantees, nor was there any successive relationship between him and Nancy Fisher or her grantees.

It is not necessary that privity of estate, within the meaning of the feudal law—mutuality—should exist between the covenantor and the covenantee or his successors in interest to carry a covenant of warranty to subsequent grantees. (*Van Rensselaer v. Read*, 26 N. Y. 558, 574, 575.) But unless there is either mutuality or succession of interest, this covenant will not run with the land. In this state privity of estate, within the meaning of the law of tenure, seldom arises, except between lessor and the successors of his lessee, or when the covenantor retains a reversionary interest in the land conveyed.

Under the facts found there was no privity of estate, actual or assumed, between the defendant (the covenantor) and Nancy Fisher (the covenantee), only privity by contract. The defendant having no estate, title or interest in or possession of the land conveyed, there could be no privity in estate between him and Nancy Fisher, and not having covenanted or represented that he had an estate, he cannot be estopped from showing that he had none. The only privity which existed between the defendant and Nancy Fisher was by contract, which is insufficient to carry the benefit to subsequent owners of the property to which the covenants relate.

In *Slater v. Rawson* (1 Met. 450), the defendant assumed to convey one hundred and thirty acres of land by a deed containing covenants of seizin and warranty. The plaintiff succeeded to the estate of the defendant's grantee through several mesne conveyances, but was evicted from twenty-two acres

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under a title which was paramount to that of the defendant. In an action to recover damages for the breach of the covenants, it was held that it appearing that the defendant had neither title nor possession his covenant of warranty did not attach to the land and run with it to subsequent grantees, and that the plaintiff could not recover. Upon the retrial the jury found that the defendant was in and delivered possession of the land when he conveyed, and it was held (6 Met. 439) that seizin was a sufficient estate to attach the covenant to the land and carry it to subsequent grantees, who could sustain an action for its breach. This rule is recognized in other cases. (*Fowler v. Poling*, 2 Barb. 300; 6 id. 165; *Beddoe v. Wadsworth*, 21 Wend. 120; *Moore v. Merrill*, 17 N. H. 75.)

In *Nesbit v. Nesbit* (1 Taylor [N. C.] 82, reconsidered and affirmed, Conf. Reports, 318), one Cranston conveyed land to Mary Montgomery, then under age, who afterwards became the wife of Arthur Newman, the consideration for the conveyance being paid by Hugh Montgomery, the father of Mary. Some years after, Hugh Montgomery, in consideration of sixty pounds, paid to him for the use of his daughter, conveyed the premises to one McConnell, covenanting for quiet enjoyment and for further assurance, to be executed by Mary when she should become of age. McConnell afterwards conveyed one-half of the land to the plaintiff, who, being evicted by Mary Newman (formerly Mary Montgomery), sued Montgomery's executors. A verdict was rendered for the plaintiff, but a motion to arrest the judgment was made, on the ground that the covenants in the deed from Hugh Montgomery to McConnell were covenants in gross, and did not run with the land to McConnell's grantee. TAYLOR, J., in speaking for the court, said: "From the whole of this case it may be laid down as a rule, without any exception, that a covenant to run with the land and bind the assignee must respect the thing granted or demised, and that the act covenanted to be done or omitted must concern the lands or estate conveyed. But when it appears upon the face of the declaration that the defendant's testator, who sold this lot, neither had nor pretended to have

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any title to it, that, on the contrary, Mary, his daughter, had the complete seizin under the deed from Cranston; that the testator having conveyed no title to McConnell, the plaintiff could, consequently, derive none from him; it may be asked, what is there to create any privity between these parties? The maxim *transit terra cum onere* presupposes a transfer of the land, and when that actually takes place, it forms the medium of a privity between the assignees. Unless, therefore, we make a presumption against the plain statement in the declaration, the title of this lot never ceased to be in the daughter, Mary, from the time Cranston conveyed to her. Suppose the father and mother had entered into the covenants contained in the deed, by a separate instrument, unaccompanied with any conveyance of the land, no one would pretend that an assignee should take the benefit of such a contract. Then, can the case be materially altered by annexing these covenants to a deed of bargain and sale, which, being a conveyance under the statute of uses, transfers only what the bargainor might rightfully convey? For the declaration shows that rightfully he could convey nothing. If one man covenants that another shall quietly enjoy or obtain a conveyance for an estate which is owned by a third, this binds the covenantor and his executors or administrators to the covenantee, but cannot extend to the assignees of the latter. Nor can I conceive that the law is different where a man sells an estate and makes the same covenants, provided it appears upon the declaration that he had no right. In both cases the privity is wanting which forms the basis of reciprocal remedies to the parties."

Webb v. Russell (3 Term, 393), arose out of the following facts: William Stokes being possessed of a term having some eighty years to run, mortgaged it to Richmond Webb as security for the payment of a debt. At this time, by the law of England, the entire legal estate of the mortgaged premises vested in the mortgagee. October 26, 1780, George Russell leased the premises for eleven years, from Stokes and Webb, and agreed to pay to Stokes, the owner of the equity of redemp-

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tion, or to his assigns, the annual rent of two hundred pounds and to keep the premises in repair. In 1781, Sarah Webb, the plaintiff, acquired the estate of the mortgagor and mortgagee, and brought an action against Russell for the recovery of rent due and for damages for breaking the covenant to repair. The defendant demurred to the declaration. It was held, Lord KENYON speaking for the court: "I cannot conceive how this covenant made with Stokes can be said to run with the land; for Stokes is stated in the declaration to have no interest whatever in the the land, and yet both the implied covenant arising from the yielding and paying, and also the express covenants are entered into with Stokes. It is not sufficient that a covenant is concerning the land, but in order to make it run with the land there must be a privity of estate between the covenanting parties. But here Stokes had no interest in the land of which a court of law could take notice; though he had an equity of redemption, an interest which a court of equity would take notice of. These, therefore, were collateral covenants. And though a party may covenant with a stranger to pay a certain rent in consideration of a benefit to be derived under a third person, yet such a covenant cannot run with the land." Subsequently Stokes sued Russell for the rent and for the breach of the covenant to repair. The facts above stated were pleaded as a defense; and thereupon the plaintiff demurred to the pleas in bar, and judgment was rendered for the plaintiff. Lord KENYON, again delivering the opinion of the court, held that the covenants were covenants in gross, and that the plaintiff could maintain the action. Errors were assigned and the judgment was reviewed in the Exchequer Chamber, where it was affirmed (1 Black. 563). Lord LOUGHBOROUGH, speaking for the court, said: "The term in this case took effect out of the estate of Webb; the covenant with Stokes could not be incident to the estate, nor run with the land; it must be a covenant in gross, and consequently not assignable."

In *Keppell v. Bailey* (2 M. & K. 517), many of the previous cases relating to covenants running with the land were analyzed

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and reviewed by Lord Chancellor BROUGHAM, and among them *Webb v. Russell*, which was approved, and it was again directly held that a covenant between a covenantor and a covenantee, between whom there was no privity in estate, does not run with the land. (Pages 543, 546.)

Cole v. Hughes (54 N. Y. 444), arose out of the following facts: Voorhies and Dean being adjoining owners, Dean erected a party-wall, one-half on the land of each, under a contract, which was recorded, by which Voorhies covenanted that whenever he, or his heirs or assigns, used the wall, he or they would pay Dean or his assigns the value of the part so used. Voorhies' lot passed by mesne conveyances to the defendant Hughes, who built on the lot and used the party-wall. Dean assigned the contract to the plaintiff, but conveyed the lot to another. In an action brought by the assignee of the contract it was held: (1.) That the covenant to Dean did not run with his land, and that the right to recover on the covenant belonged to the plaintiff, the assignee of the covenant, and not to the grantee of the lot. (2.) That Voorhies' covenant to pay for the value of the wall did not run with his lot, and that there being no privity of estate between Voorhies and Dean, only a privity by contract, that the covenant did not run with Voorhies' lot. The learned judge said in conclusion: "I am of opinion, therefore, that neither the benefits nor the burdens run with the land." The opinion does not proceed upon the theory that the nature of the covenant was such that it could not run with the land; but on the theory that there being no privity of estate between the covenantor and covenantee, only a privity by contract, that neither the benefits nor burdens of such covenants run with the land to which they relate. Mr. Washburn in his learned treatise upon the law of real property, says (2 Washb. R. P. *15 [5th ed.] 296): "16. It has also been attempted to maintain the doctrine, that although the *burden* of a covenant to pay rent may not be imposed upon land in favor of a stranger so as to run with it, and bind an assignee of the land, a stranger may covenant with the land-owner in such a manner as to attach the benefit

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of the covenant to the land, and have it run with it in favor of whoever may become the owner thereof. It is not pretended that this can be done, except where the covenant is to do some act for the benefit of the estate upon the land itself. The doctrine above stated is advocated by the editor of the American edition of Smith's Leading Cases, is favored by the English Commissioners upon Real Property, and is assumed to be the law in the cases cited below. To sustain it reference is also made to *Packenham's* case, commonly known as the *Prior and Convent* case, and to Coke's opinion.

"But it is believed that the point has never been determined in this way by a full court, though assumed by individual judges, and that, respectable as these opinions in its favor may be, the doctrine contended for is opposed to well-settled principles as well as the highest authority. With a very few exceptions, the uniform current of authorities, from the time of *Webb v. Russell* to the present day, requires a *privity of estate* to give one man a right to sue another upon a covenant where there is no privity of contract between them; and, consequently, that where one who makes a covenant with another in respect to land, neither parts with nor receives any title or interest in the land, at the same time with and as a part of making the covenant, it is, at best, a mere personal one, which neither binds his assignee, nor enures to the benefit of the assignee of the covenantee, so as to enable the latter to maintain an action in his own name for a breach thereof."

KENT states the rule in this language: "The distinction between the covenants that are in gross and covenants that run with the land (and which are covenants real, annexed to or connected with the estate, are beneficial to the owner of it, and to him only) would seem to rest principally on this ground that, to make a covenant run with the land, *there must be a subsisting privity of estate between the covenanting parties.*" (4 Kent's Com. 473.)

LORD ST. LEONARDS discusses this question at considerable length, and reaches the conclusion that the covenant of a stranger to a title does not run with the land. (2 Sugd. on

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Vend. *716, 718, 719, 721 [7th Am. ed.] 168, 170, 171, 173, pp. 25, 26, 33-35, 38; See Platt on Cov. 461; Chitty on Con. [12 ed.] 51; 1 Taylor's L. & T. [8 ed.] § 261.)

In *Hurd v. Curtis* (19 Pick. 459), the owners of four mills, which were supplied with water by the same dam, entered into an indenture by which they covenanted for themselves, their heirs, administrators and assigns, to and with each other, their heirs, administrators and assigns, that they would use wheels of a certain construction and limited power in their respective mills. The plaintiff was a party to the indenture and owned an undivided half of one of the mills, and subsequently he acquired the other half. Later the defendants purchased of two of the covenantors their mills, and thereafter used wheels of a different construction and of greater power than those specified in the indenture. In an action brought to recover damages for this breach of the covenant, it was held that there being no privity of contract between the plaintiff and defendants that the defendants were not liable unless there was a privity of estate between them. In discussing this question it was said: "To make a defendant liable to an action of covenant there must be a privity between him and the plaintiff. (*Bally v. Wells*, 3 Wils. 29.) As there is no privity of contract between the plaintiff and the defendants, it follows that the defendants are not liable in this action, unless there is a privity of estate between them. Where such a privity exists between the covenantor and the covenantee, and the covenantor assigns his estate, the privity thereby created between the assignee and the other contracting party renders the former liable on all such covenants as regulate the mode of occupying the estate, and the like covenants concerning the same. *And so if the covenantee assigns his estate, his assignee will have the benefit of similar covenants. These covenants are annexed to the land and run with it. But if there is no privity of estate between the contracting parties, the assignee will not be bound by, nor have the benefit of any covenants between the contracting parties, although they may relate to the land he takes by assignment or purchase from one of the parties to the*

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contract. In such a case the covenants are personal and are collateral to the land."

Opposed to these authorities are the remarks of the learned American editor of the eighth edition of Smith's Leading Cases, page 192; *Dickinson v. Hoomes' Administrator*, 8 Grat. 406. Judge HARE, in his learned note to *Spencer's* case, in the edition of Smith's Leading Cases last referred to, said: "It appears, therefore, to be an exploded idea that privity of estate or tenure is necessary between the covenanting parties in order that covenants may run with the land."

Dickinson v. Hoomes' Administrator (8 Grat. 353), arose out of the following facts: A father devised to every one of his five children a piece of land, subject to the limitation that if any one died without issue his piece should be divided equally between the survivors or their representatives according to the principles of the law of descents. The five children survived their father, and entered on their several pieces of land. One of them, John, conveyed his land and the other four children joined in the deed, which contained a covenant of warranty. This land passed by several mesne conveyances to Dickinson, the plaintiff. Richard, one of the children and covenantors, died, in the lifetime of John, leaving several children, and afterwards John died without issue, and thereupon Richard's children evicted Dickinson, claiming, not by descent from their father, but under the devise of their grandfather. An action was brought on the covenant of Richard against his representatives; and it was held that when Richard joined in the deed "he had, in fact, an interest in the subject; an interest which depended on the double contingency of John's dying without issue living at his death, and of Richard's surviving him." (Page 402.) In considering the question whether it is necessary that some estate should pass from a grantor to a grantee, to carry a grantor's covenant of warranty to subsequent grantees, the learned judge discussed *Prior's* and *Spencer's* cases, and held, in accordance with the rule generally adopted in this country, that it was not necessary that an estate should pass. But in

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discussing this question the court indulged in the following reflections, which were quite unnecessary for the determination of the case, which had been well decided on the first ground stated: "I can see no reason why these covenants, if in their nature they are such as can run with the land, should not run with the land as well as when they are made by a stranger as when they are made by the donor; but I can see many reasons for the contrary. A person may be willing to purchase land, notwithstanding a flaw in the title, if he can fortify it by proper covenants. The owner may not be sufficiently responsible, but may be able to procure the assistance of responsible friends, or creditors, or others may have sufficient interest to join him in the covenants. But what would these covenants be worth if they could not be enforced by an assignee of the land? A covenant of seizin, or of right to convey, would never be given in such a case, because it would be known to the parties that as soon as made, it would be *ipso facto* broken. A covenant of warranty, or for quiet enjoyment, would be the most appropriate covenant for such a case; and yet, to make that covenant effectual, it would be necessary, according to the doctrine contended for, that the covenantee should always retain the property. I am, therefore, of opinion that the covenant of Richard Hoomes runs with the land, even though he should be considered as a stranger to the land." (Page 404.)

In *Lydick v. The Baltimore and Ohio Railroad Company* (17 West Va. 427) the court refers to the conflicting views on the question as to whether the covenant of a stranger runs with the land, and says: "It is not necessary in this case to determine which of these views is sound. For, in the case before us, the requisite privity of estate exists according to the views of Washburn, who holds such privity to be necessary." It will be observed that in this case there had been no grant of any kind to the railroad, simply an oral contract for a right of way, which, had it been granted, would have left the reversion in the owner, and would have created a privity of estate according to the strict rule prevailing when land was held by feudal tenure.

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The views of Judge HARE and of the court in *Dickinson v. Hoomes* have been the occasion of some discussion. A writer in the American Law Register ([N. S.] vol. 2, p. 201) says: "The following topic must be kept distinct from one shortly to be considered, namely, what amount of estate must pass to support the covenants when the covenantee's only title is derived from the covenantor. It is conceded that, in order for covenants in general to run with the land, there must exist a *privity of estate* between the parties. (3 Wilson, 29; 3 T. R. 402; 2 East, 380; 17 Wend. 136.) But eminent legal writers have thought this not to be requisite in covenants for title; nor, indeed, in any covenants intended to benefit the estate of the covenantee. (Hare's Note to *Spencer's* case; Rawle on Cov. 335; 2 Lomax's Dig. 260; 3d Real Prop.; Rep. of Eng. Commissioners.) This opinion has been founded almost exclusively upon the authority of an ancient case, known as the *Prior's* case (Y. B. 42, Ed. III, 3), cited by Lord COKE. In controverting this view, Sir Edward Sugden, now Lord ST. LEONARDS (Sugd. on Vend. & Pur. 472), has subjected the *Prior's* case to a most searching criticism, which results in its complete overthrow as authority on this question, showing that the portions of it particularly relied on were not judicial resolutions, but an addition by the reporter; that the case does not contain the doctrine usually extracted from it, and that it has received no confirmation, but the contrary, from subsequent adjudications.

"It may be safely laid down, that if the doctrine that the covenants for title will run with the land, even when entered into by a stranger to the land, has no better foundation than the authority of this case, it cannot be sustained; and it would seem to be the better opinion, that in order for a *covenantor's* covenants to run with the land, he must also be a *grantor* of the land which they affect. No modern case decides that a *stranger's* covenants may run with the land; but in a *dictum* of MONCURE, J., in the recent case of *Dickinson v. Hoomes' Administrator* (8 Grattan, 406), this doctrine is broadly enunciated. The *dictum* is based, however, on the *Prior's* case,

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and authors who have followed it. It is there said that a purchaser of land who suspects an infirmity of title, and doubts the responsibility of the vendor, may fortify the title by covenants of the *grantor's* friends, or other interested parties, and these covenants will run with the land to future assignees. This notion is possibly correct, and, if so, highly important, but is not, we apprehend, in accordance with the common understanding among the members of the legal profession. (7 Jarman's Bythewood, 572.) The introduction of such covenants into conveyances would be a novelty, and probably of doubtful expediency. At least it would not be prudent to rely on such covenants until further adjudications have more fully determined their value."

In the American Law Review (vol. 20, 404), Judge HARE's note is discussed, and the writer, in conclusion, says: "But the authority of *Packinham's* case seems to be overthrown by the investigations of Sugden and Washburn, who produce unquestionable proof that the case was not decided by the court, as reported by Lord COKE, but that Lord COKE's report was the expression of a mere *dictum* by Finchden. This case, then, being authority no longer, the foundation is destroyed of the proposition that even strangers, covenanting to annex a benefit to the land, may be held liable in the suit by the assignees of the tenant with whom the covenant was made. The doctrine, therefore, advanced by the learned annotator of *Spencer's* case, that even strangers may be bound by covenants benefiting the land, is unsound."

The editor of the ninth American edition of Smith's Leading Cases (vol. 1, 211) takes a different view of this question from the one taken in the earlier editions. He says:

"It seems that there must be between covenantor and covenantee the relation of grantor and grantee, which is all that there is between the grantee and his assignee. It is not thought that a covenant of warranty made by a stranger to the land would run with it, and perhaps the relation necessary to exist is that which would have constituted privity of estate at common law before the statute of *Quia Emptores*, although

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the rent or services reserved which were, perhaps, an incident of the old privity, are not now usual. On the authority of *Packenham's* case, sometimes called the *Prior's* case, stated in the text, the English editor lays it down broadly that the covenantor may be a stranger to the land, but that case stands by itself, and it may well be doubted if, at the present day, a covenant to warrant the title, or to keep buildings in repair (for instance), made by a stranger to the land, would be held to run. It is possible that some explanation of that case might be found in the religious nature of the service and the connection of the convent and the manor. If it should be followed to the extent suggested by the English editor, it would be a startling exception to the otherwise universal rule that there must be some land or interest in land pass in connection with the covenant."

Covenants annexed to estates in privity, or covenants running with the land, are incidents to the estate. Coke, when at the bar, successfully took the position (*Noke v. Auder*, Cro. Eliz. 373) that if A had no estate in land and assumed to convey it with covenants for title to B, who assumed to convey it with like covenants to C, that C being evicted by a title paramount to A's pretended title, could not recover against A on his covenant, because he having no estate, title or interest in the land, nothing passed to B to which the covenants could attach as incidents. This doctrine led to the logical conclusion that when a grantee lost his land and needed the aid of his covenants for title, that they became worthless. Much that has been written about the liability of strangers to title being liable on their covenants of warranty has been in refutation of the doctrine of the case last cited. It is hardly necessary to say that this doctrine has long been exploded, and is but remotely, if at all, connected with the question which lies at the root of this case.

The judgment should be reversed and a new trial granted, with costs to abide the event.

BRADLEY, J. (dissenting). The question whether the defendant's covenant ran with the land, or whether he was capable

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of making a covenant having that effect, was not specifically raised by any exception taken at the trial, or to any finding or refusal to find of the trial court. The court found that Almira S. Coe and the defendant, her husband, made a deed of the lands described in the complaint purporting to convey them in fee simple to Nancy Fisher, and "that said deed contained covenants of seizin, right to convey, against incumbrances, quiet enjoyment, further assurances and warranty, which covenants were made by the defendant and Almira S. Coe jointly." No exception was taken to this finding. As conclusion of law the court found that the covenants were broken, and that the plaintiffs were entitled to recover against the defendant the amount there mentioned. To this conclusion the defendant excepted. And he requested the court to find that "Almira S. Coe and the defendant made, executed and delivered to Nancy Fisher a deed conveying the premises described in the complaint, which deed contained covenants of warranty, seizin and quiet enjoyment." The court so found. This was the only request to find having relation to the character of the defendant's covenant. And the defendant's request that the court find as conclusion of law that the complaint be dismissed was refused, and exception taken. Those were the only exceptions taken by the defendant. It is true the court found that Roberts conveyed the premises to Almira S. Coe, and that she then entered into the occupancy and continued in it until the conveyance to Nancy Fisher, who then went into possession. And it appeared as evidence that the deed made by the defendant and his wife contained the covenant made by them, that the wife was lawfully seized of a good, absolute and indefeasible estate of inheritance in fee simple of the premises, also the usual covenants of quiet enjoyment, further assurances and of warranty. But the court did not specifically find, nor was it requested to find, that the defendant had no interest in the premises at the time of the conveyance, nor was any motion to dismiss the complaint made at the trial on that or any ground. Facts not found, and which the court was not requested to find, are not entitled to consideration in this court for the

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purpose of reversing the judgment. (*Burnap v. National Bank*, 96 N. Y. 125.)

The possession of the premises was delivered to and taken by the grantee pursuant to the deed of conveyance in question. This was sufficient estate to carry the covenants of warranty as an incident to the land to the assignee of the grantee, and on his behalf to support an action upon such covenant upon being evicted by title paramount. (*Beddoe's Exr. v. Wadsworth*, 21 Wend. 120; *Fowler v. Poling*, 6 Barb. 168; *Slater v. Rawson*, 6 Metc. 439; *Wead v. Larkin*, 54 Ill. 489; 5 Am. R. 149.)

But treating as found the fact that the covenant of seizin in the deed was that it was in the defendant's wife, the question arises whether the defendant's covenant of quiet enjoyment, etc., ran with the land. He was a grantor named in the deed, and the covenants were made by him and his wife jointly; and the grantee took by the conveyance an estate in the land. One of the recognized differences between a covenant which is and which is not available to the assigns of a grantee in a deed of conveyance is that the former relates to the estate, is made for its benefit and tends to enhance its value, while the other is collateral to it and does not pass beyond the covenantee. (Shep. Touch. 161, 176.) The former in case of grant in fee does not rest upon privity of estate with the covenantor, but privity, so far as essential for the transmission of the covenant from the covenantee, is with the latter. (*Norcross v. James*, 140 Mass. 188, 189; *Norman v. Wells*, 17 Wend. 136, 150, 151; Pollock's Law of Contracts [5th ed.] 226; 2 Chitty on Contracts [11th Am. ed.] 1383, 1388; Holmes on Common Law, 404.) And upon the proposition that a covenant intended to benefit the land made to the owner by a stranger to the title may become attached to and go with the land and be available to a subsequent owner of it, the *Pakenham Case* (Y. B. 42 Edw. III, 3) has frequently been referred to and cited by elementary and judicial writers. There the Prior with the consent of his convent, for himself and his successors, by deed covenanted with the owner that he and his

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convent would sing, etc., in such owner's chapel on the manor. It was held that this covenant was annexed to and passed with the land of which the chapel was a part. The doctrine of that case has been questioned by Sugden and Washburn, but the view of the former, as represented by his later editions, is that the doctrine of privity of estate is not applicable to covenants entered into by a vendor. (Sugd. on Vend. [14th ed.] c. 15, § 1, pl. 14 *et seq.*) And it may be observed that the *Prior's* case has quite generally been cited and its principle stated with apparent approval in England and in this country. (Shep. Touch. 176; Coke Lit. 385a; Bacon Abr., Covenant E.; *Spencer's Case*, 5 Coke, 16; Smith's Leading Cases, 22, 26; *Vyvyan v. Arthur*, 1 Barn. & C. 410, 415; *Norman v. Wells*, 17 Wend. 136, 151; *Allen v. Culver*, 3 Denio, 284, 289, 301; *Dickinson v. Hoopes*, 8 Gratt. 353, 403; *Van Rensselaer v. Read*, 26 N. Y. 574; *Norcross v. James*, 140 Mass. 190; Holme's Com. Law, 395; Hamilton on Cov. 96.)

In *Keppell v. Bailey* (2 Myl. & K. 517), the doctrine of the *Prior* and *Convent* case had no necessary application to the question presented and determined. It was there held that a covenant made by the proprietors of an iron-works property to transport material for their works from a certain mine over an adjacent railroad was a personal covenant merely, and did not pass by the sale of the iron-works so as to charge the vendee with the obligation to perform. There was no relation of lessor and lessee between the parties, nor was there any connection between their estates. And to permit the covenant to run with the land and the burden of it to fall upon the vendee of the covenantor, privity of estate, which did not exist between them, was essential.

And such was the case of *Hurd v. Curtis* (19 Pick. 459), where Mr. Justice WILDE, in delivering the opinion of the court, said: "There is no exception to the rule that no covenant will run with the land so as to bind the assignee to perform it unless there were a privity of estate between the covenantor and covenantee." Such was also the case of *Cole v. Hughes* (54 N. Y. 444). There is no opportunity to doubt

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the essentiality of privity of estate between the original parties to a covenant to carry the burden of covenantor to his assignee. That was the principle upon which *Bally v. Wells* (3 Wilson, 25) was decided, and where *Spencer's* case was thoroughly considered and its doctrine applied. Nor can the soundness of the principle upon which *Webb v. Russell* (3 Durn. & E. 393) was determined be questioned. There the action was upon the covenant in a lease against the assignee of the lessee to recover rent and for failure to repair. The demurrer to the declaration was sustained, because it appeared by it that the reversion was not in the plaintiff. The privity of estate requisite to support an action against the assignee of the lessee is only between the latter and the owner of the reversion. And the covenant in that lease was effectual to support the later action by the party having the reversion in *Stokes v. Russell* (Id. 678); *Dolph v. White* (12 N. Y. 296). Those cases do not necessarily have any application to the question in the present one. They had relation to covenants as burdens, which to run with the land must have the support of privity of estate between the covenanting parties, and generally rest upon the relation of landlord and tenant. There may occasionally have been some confusion given by *dicta* indicating that contracts which operate to create easements run with the land as burdens. This is not strictly correct. The contracts so operating are executed ones and create vested rights. A grant is not a covenant, and a covenant that runs with land is executory. The rule that covenants run with the land as a burden was founded upon or deduced from the feudal law, where the relation of landlord and tenant existed. That rule is not applicable to conveyances in fee of the entire estate of the grantor. The covenants of warranty are purely a matter of contract between the parties to the deed of conveyance containing them, and being beneficial in their relation to the estate, which the deed purports to convey, they become annexed to it when it passes from the covenantor to his assignee; and through the medium of the conveyance to the latter, become available to him, in case of breach, while he

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retains the relation of grantee to the land. (Bingham Real Estate, 429.) This is not founded upon privity of estate with the covenantor, and it rests upon privity of contract for the reason only that the conveyance by the covenantee operates as an assignment by him of the covenants of warranty taken by the latter from his covenantor. But the doctrine that such covenants pass with the estate from the covenantee is an exception to the general rule requiring privity of estate between covenantor and covenantee, and evidently was adopted upon commercial considerations deemed advantageous to the transmission of estates in fee, by giving the grantee the benefit of covenants of quiet enjoyment, contained in any of the conveyances in the line through which the grant to him may be traced. (Bingham Actions and Defenses, 401, 405, 406.) This character of such a covenant is recognized by the learned justice in *Hurd v. Curtis*. He says: "Covenants of title may be considered as an exception to the general rule, and the reason for the exception is very strong, for nothing can be more manifestly just than the party who loses his land by a defect of title should have the benefit of the covenants, which were intended to secure an indemnity for the loss. Such a covenant is dependent on the grant, is annexed to it, as part and parcel of the contract, and runs with the land in favor of the assigns of the grantee or covenantee." Then he proceeds to state, substantially, as before quoted, that to impose a burden upon the assignee the rule that there must be privity of estate between covenantor and covenantee is without exception. And the same distinction was observed by Judge EARL in *Cole v. Hughes*, in his statement there made, that "there is a wide difference between the transfer of the burden of a covenant running with the land, and of the benefit of the covenant. The benefit will pass with the land to which it is incident, but the burden or liability will be confined to the original covenantor, unless the relation of privity of estate or tenure exists or is created between the covenantor and covenantee at the time the covenant is made." This is undoubtedly the rule upon the subject. And since the statute of *quia*

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emptores, where it was applicable, and in this state after the act of 1787 (Chap. 36, 1 R. L. '70), concerning tenures, of which the provisions of sections 3 and 4 of 2 Revised Statutes, 718, are a substitute, a conveyance in fee of the entire estate of the grantor has not permitted a covenant between him and his grantee to run with the land as a burden to charge the assigns of the latter. The fact that covenants of warranty of the grantor in a deed of such a conveyance pass to the assigns of the grantee is an exception to the general rule requiring privity of estate with the covenantor. And this is because they are treated as attached to the land as a benefit and pass with it as an incident. The *Prior's* case has repeatedly received such judicial sanction in this state as to require some reason, which does not now occur to me, why, within its doctrine, a covenant, independent of the grant, made by a stranger to the title, to the owner of the land and intended for the benefit of his estate, and beneficial to it, may not as such become attached to and pass with it to a subsequent owner. This would not embrace all covenants beneficial to the estate, but only such as are *solely* for its benefit, and thus for the benefit of the owner *alone* in his relation to the lands. I do not pursue the consideration of that case, or seek by any reasoning to sustain or qualify it, because its authority is not deemed essential to the support of the view taken that the defendant's covenant in the present case passed with the estate in the land to the assigns of the covenantee. He was not a stranger to the terms of the grant, but he was one of the parties named as grantors in the deed by which the conveyance of the estate granted was made, and his covenants of warranty and further assurance were made jointly with his wife. His relation, so far as related to those covenants to the grantee, was no different, in any respect or for any purpose, than those of the wife, and they went with the estate to the assigns of the grantee. (*King v. Jones*, 5 Taunton, 418; *Dickinson v. Hoomes*, 8 Gratt. 353; *Colby v. Osgood*, 29 Barb. 339.) This, as before remarked, is not dependent upon privity of estate, for none exists between the covenantor and covenantee in a

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conveyance in fee in the legal sense of the term, nor between the former and the assigns of the latter, but the benefits of the covenants of warranty, taken by the grantee in the instrument by which the grant is made, pass to his assigns as an incident to the estate. And in *Norman v. Wells* (17 Wend. 149, 150), Mr. Justice COWEN gives the reason why such covenants are available to an assignee in the remark: "Why do charters and covenants for assurance and warranty and the like follow the land? Because they make part of its value." (2 Wash. R. P. [4th ed.] 286, 287.) And the learned justice in the case last cited approvingly refers to the fact that the court, in *Vyvyan v. Arthur*, proceeded upon the *Prior's* case (p. 151), and in commenting upon *Keppell v. Bailey* he does not adopt the *dictum* of the lord chancellor there in respect to that case. (Pp. 153-155.) It may be observed that what is usually stated in the books on the subject of privity of estate, has reference to the general rule applicable to the relation, arising out of leases between landlord and tenant, or one of them, and the assigns of the other, or between the assigns of both of them.

The right of action upon covenants in leases is dependent upon privity of estate existing between the owner of the reversion and the lessee or his assigns; and the covenants of the lessee are for the benefit of the reversion, and go with it. They pass to his assignee as a burden. Notwithstanding that situation, it was held in *Allen v. Culver* (3 Denio, 284) that the grantee of the lessor of the reversion could maintain an action against the person who, by a separate instrument made at the same time as the lease, had become surety of the lessee for the payment of the rent. This could rest on the ground only that the covenant of the surety was, in practical effect, inseparable in point of liability with that of the lessee. There privity of estate was not only requisite, but the covenant of the surety was not united in the same instrument with that of the lessee, and by which the demise to him was made. That case, therefore, goes further than is necessary for the support of the liability of the defendant upon his covenants to the assignee of the covenantee. In the view taken of the case at

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bar, that of *Nesbit v. Nesbit*, (1 Taylor [N. C.] '82), has no essential bearing upon the question here presented. There the parties, who made the deed poll, neither had nor pretended to have any estate in the land, but it appeared by it that they received the consideration in behalf of their daughter, who had the title, and on her behalf bargained and sold the premises, and covenanted that when she arrived at age she would execute further assurance, etc., and if she nulfied the sale they would refund to the purchaser double the amount of the purchase-money paid by him, and pay him the damages sustained. She afterwards married, and her husband asserted the title of his wife and entered into possession of the premises which had been conveyed by such purchaser to another, who brought action upon the covenant against the executors of the covenantor. It was finally held that the action could not be supported, for the reason that it appeared upon the face of the declaration that the defendant's testator neither had nor pretended to have any title, and in support of the determination was cited *Noke v. Auder* (1 Croke's Eliz. 373), upon which no comment is needed.

In the *Nesbit* case it appeared by the deed that no estate could pass from the grantors to the grantee, which was essential to carry the covenant, and without which there was nothing to which it could be attached as an incident, or to furnish a medium of transmission of the covenant to the assignee. In the present case there was an estate in the land conveyed, and with it the covenants of warranty contained in the deed passed to the assigns of the covenantee. Those of the defendant, made jointly with the wife, no less than hers, were beneficial to the grant and to the estate granted, became an incident to the land and passed with the estate from the covenantee.

The further question, and the one mainly considered in the court below, is whether the defendant's covenant was available to the plaintiffs. They became mortgagees of Nancy Fisher while she occupied the premises under the grant from the defendant and his wife. Mrs. Fisher afterwards conveyed to Fuller, and he to Clara B. Leavitt, all of whom respectively

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entered into possession under the several conveyances. While the action of ejectment against Leavitt, which resulted in her eviction by title paramount, was pending, the plaintiffs commenced their action to foreclose the mortgage made by Fisher, in which decree was obtained, pursuant to which the land was sold and purchased by the plaintiffs. They never acquired the possession, and, therefore, were not evicted, but before they obtained the deed of the sale upon the decree, the eviction of Mrs. Leavitt had been accomplished. For those reasons it is insisted, on the part of the defendant, that the plaintiffs took no right of action upon the covenant of warranty against the covenantor. This would be so if their rights as purchasers had relation in time to that when the sheriff's deed was made to them, because then there had been a breach of the covenant, and it had become a mere chose in action, and a conveyance by Leavitt then made would have been ineffectual to afford any remedy upon it by her grantee. But that was not the situation when the mortgage was made. The foreclosure and sale, in practical effect, eliminated the defeasance from the mortgage. The plaintiffs, as purchasers, took the estate which the mortgagor had at the time the mortgage was given, and to that time, and the situation in that respect as it then was, their rights derived from the sale had relation. (*Rector, etc., of Christ Church v. Mack*, 93 N. Y. 488; *Lewis v. Cook*, 13 Iredell [Law], 193; *White v. Whitney*, 3 Metc. 81.)

Mrs. Leavitt was a party defendant in the foreclosure action, and whatever estate or right, by way of equity of redemption, she had was cut off and barred and taken by the plaintiffs, who, as purchasers, became assignees of the interest she had acquired by her purchase of the premises. (*Howell v. Leavitt*, 90 N. Y. 238.) But for the mortgage and its foreclosure, her right as incident to the estate conveyed to her was, upon eviction, to seek indemnity by action upon any covenant running with the land to her. And this right of Mrs. Leavitt, annexed to the land as incident to the estate she had purchased, was, as such, taken by the purchasers upon the mortgage foreclosure, and they alone could maintain an action upon the covenant.

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For the reasons already given, this did not embrace the covenants of her immediate grantor. The consideration of the mortgage was \$15,000. That, and not the amount for which the judicial sale was made, was properly made basis of damages and recovery by the plaintiffs. (*Greenvault v. Davis*, 4 Hill, 643.)

A different question in this respect may have been presented if a person other than the mortgagees had purchased the property on the foreclosure sale.

The court found that to be the actual amount loaned, and the payment of which the mortgage was made to secure was that sum.

The judgment should be affirmed.

All concur with FOLLETT, Ch. J., except BRADLEY, HAIGHT and BROWN, JJ., dissenting.

Judgment reversed.

THE NATIONAL TRADESMEN'S BANK, Appellant, v. MARGARET WETMORE, Respondent.

The subjects of fraud and trusts are peculiarly matters of equity jurisdiction, which is comprehensive where other tribunals cannot afford relief, and want of it is not to be inferred from the novelty of the questions presented.

While the recovery of a judgment and the return of an execution issued thereon unsatisfied are essential prerequisites to the maintenance of an action in the nature of a creditor's bill under the statute (2 R. S. 173, § 38; Code Civ. Pro. § 1871), and while, as a general thing, the same rule is applied to actions in equity, having in their purpose or the relief sought the nature of statutory creditor's bills, it does not extend so far as to deny to a creditor the interposition of the equity powers of the court where the situation is such as to render it impossible for him to take those preliminary steps.

In an action by plaintiff, as a creditor of W., to set aside as fraudulent, a deed of real estate made by W. to his wife through a third person, of land in this state, it appeared that W., who resided in Connecticut, having become insolvent, made an assignment for the benefit of creditors to a citizen of that state. Plaintiff brought actions there upon his claims against W., who died while they were pending. His assignor was appointed administrator of his estate, and upon plaintiff seeking to

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revive and continue the actions against said administrator, the court directed that the actions abate and be discontinued. According to the prescribed practice in said state, the probate court appointed commissioners in insolvency, to whom plaintiff's claims were presented; they settled and fixed the amount thereof. The assets were insufficient to pay the expenses of the settlement of the estate and the preferred claims. The trial court found that the deed in question was made after W.'s indebtedness to plaintiff accrued, without consideration and with intent to defraud his creditors, and that at the time of his death, W. had no title to any property, real or personal, in this state. Defendant claimed that as no execution had been issued and returned unsatisfied, founded upon any judgment recovered by plaintiff, this action could not be maintained. *Held* (FOLLETT, Ch. J., dissenting), untenable; that the situation being such as to render it impossible for plaintiff to recover a judgment upon which execution could be issued, a court of equity had power to grant relief.

Also *held*, that the determination of the commissioners became as conclusive and binding upon the trustee as if it had been a recovery by action against him in a court of law.

Also *held* (FOLLETT, Ch. J., dissenting), that as under the laws of Connecticut, real estate not within that state was exempted from the operation of the assignment, the assignee could not as a representative of the creditors, bring an action in this state under the act of 1858 (Chap. 314, Laws of 1858) to reach the lands in question.

It seems that as plaintiff had no lien upon the property he could not, after the death of W., obtain any preference over his other creditors; and that his action can be only effectual as one for the benefit of himself and the other creditors.

The complaint proceeded solely in behalf of the plaintiff and demands relief for its benefit alone. A final judgment was directed by the trial court in plaintiff's favor, which the General Term reversed, and directed final judgment for defendant. *Held*, error, so far as the direction for final judgment is concerned; that assuming there was a defect in the pleadings it was available only by demurrer or answer (Code Civ. Pro. §§ 488, 499); that as it was not so presented and as defendant answered, the judgment to be directed was not controlled by the relief demanded, and the court could direct such judgment as would be proper upon the facts in favor of plaintiff and other creditors.

(Argued June 26, 1890; decided January 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 9, 1887, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special

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Term and directed final judgment against plaintiff dismissing the complaint with costs.

This action was brought to set aside, as fraudulent, a deed from Abner C. Wetmore through a third person to his wife, the defendant herein, and for a sale of the lands described therein in order to pay a debt due plaintiff from said Abner C. Wetmore.

Between August 20, 1882, and December 28, 1882, Abner C. Wetmore, a resident of the county of New Haven, in the state of Connecticut, became indebted to the plaintiff, a resident of the same place, in \$5,869.07 on an over-draft and on eleven promissory notes maturing on various dates between December 24, 1882, and March 21, 1883. December 28, 1882, Wetmore conveyed to Ulysses S. Campbell without consideration, an undivided one-third interest in 11,230 acres of land in the county of Hamilton, in the state of New York, and he on the same day, assumed to convey without consideration, and by an unsealed deed, the same land to the defendant. January 3, 1883, the deeds were recorded in the office of the clerk of that county. February 19, 1883, Wetmore made a general assignment of all his property to Eli Ives, of the county of New Haven, in the state of Connecticut, for the benefit of creditors, which was recorded on the same day in the court of probate for that county. The assignee accepted the trust and his appointment was confirmed by the court of probate and he became the legal and acting assignee, and so continued until April 19, 1883, when he resigned and Charles P. Ives, of the county of Hartford, in the state of Connecticut, was by the court of probate, duly appointed trustee of the assigned estate, pursuant to the statutes of that state; he accepted the trust, qualified and entered upon the discharge of his duties, and has ever since remained the legal and acting trustee of said estate. The plaintiff began actions against Abner C. Wetmore in the courts of Connecticut for the recovery of the sums due from him to it, and was engaged in prosecuting them when in June, 1883, Wetmore died intestate, and in October, 1883, Charles P. Ives (the substituted assignee) was duly

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appointed administrator of the intestate's estate, accepted the trust and has ever since remained the legal and acting administrator and assignee of, said estate.

Under the statutes of Connecticut actions for the recovery of money due on contract may be revived and prosecuted against the personal representatives of a solvent estate; but if the estate be insolvent the court of probate may adjudge that no actions except to recover debts due the United States, the state of Connecticut, the expenses of the decedent's last sickness or of his funeral charges, shall be prosecuted. Pursuant to this law that court on the 27th of December, 1883, adjudged that the intestate's estate should be settled as an insolvent one, and that the plaintiff's actions should be discontinued, and they were. By the statutes of Connecticut, commissioners are appointed by the probate court to adjudge and determine claims presented against insolvent estates, pursuant to which commissioners were appointed to determine the claims due from the estate of said Wetmore, and it was adjudged by them that there was due to the plaintiff from the estate on the 24th of November, 1883, the sum of \$6,177.64. The commissioners allowed preferred claims against the estate to the amount of \$296.93, and unpreferred ones for \$28,129.94. The assets of the estate were insufficient to pay the expenses of settling it and the preferred claims.

Other facts appear in the opinions.

H. R. Durfee for appellant. The court below erred in dismissing plaintiff's complaint. (*Griffin v. Marquardt*, 17 N. Y. 28, 30; *Schenck v. Dart*, 22 id. 422; *Foot v. E. L. Ins. Co.*, 61 id. 578; Code Civ. Pro. § 1317.) As it does not appear from the judgment of the General Term that the judgment of the trial court was reversed on a question of fact, the findings of fact made by that court are not subject to review. (Code Civ. Pro. §§ 1337, 1338; *Van Tassel v. Wood*, 76 N. Y. 614; *In re Cottrell*, 95 id. 332.) As to existing creditors of Abner C. Wetmore, his conveyance to Campbell and Campbell's conveyance to the defendant, are fraudulent and void. (*Carpenter*

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v. *Roe*, 10 N. Y. 227; *Babcock v. Eckler*, 24 id. 623; *Erickson v. Quinn*, 47 id. 413; *Cole v. Tyler*, 65 id. 77; *Young v. Heermans*, 66 id. 384.) The action is not a creditor's bill, and is not within the statute (2 R. S. 174, § 38) which requires the recovery of a judgment and the issuing of an execution and its return unsatisfied as conditions precedent to the suit. (*C. C. Bank v. White*, 6 N. Y. 252; *McCartney v. Bostwick*, 32 id. 62; *Adsit v. Butler*, 87 id. 558; *Case v. Beauregard*, 101 U. S. 690; *Turner v. Adams*, 46 Mo. 95; *Keeler v. Homes*, 3 Ia. 365; *Ticonie Bank v. Harney*, 16 id. 141; *Botsford v. Beers*, 11 Conn. 369; *Payne v. Sheldon*, 63 Barb. 169; *Thurmond v. Reese*, 3 Ga. 449; *Cornell v. Radway*, 22 Wis. 260; *Sanderson v. Stockdale*, 11 Md. 563; *Bump on Fraud. Con.* 517; *Harvey v. McDonnell*, 113 N. Y. 526; *Andrew v. Vanderbilt*, 37 Hun, 470; *Shellington v. Howland*, 53 N. Y. 371; *Handy v. Draper*, 89 id. 337; *Kincaide v. Dvinelle*, 59 id. 551; *Hetzel v. T. S. M. Co.*, 4 Abb. [N. C.] 42; *Kingsley v. City of Brooklyn*, 78 N. Y. 316; *Kendall v. Corning*, 88 id. 137; *Ballou v. Jones*, 13 Hun, 631; *Kamp v. Kamp*, 46 How. Pr. 143; *Bailey v. Bussing*, 37 Conn. 352; *Loomis v. Eaton*, 38 id. 550; *F. N. Bank v. H. L. & A. Ins. Co.*, 45 id. 22; Code Civ. Pro. § 2476.) The respondent is not in a position to raise any question as to the conveyance of the lands described in the complaint by Wetmore to Campbell or by Campbell to the respondent. (*Edward v. Lent*, 8 How. Pr. 28; *Fales v. Hicks*, 12 id. 153; *Wood v. Raydure*, 39 Hun, 144, 146.) The deed from Abner C. Wetmore to Campbell is not rendered invalid by the statute of Connecticut. (31 Conn. 67.) It was not necessary that the deeds from Wetmore to Campbell and from Campbell to the respondent should be acknowledged in order to convey the title. (1 R. S. 738, § 137; *Fryer v. Rockefeller*, 63 N. Y. 274; *Rathbun v. Rathbun*, 6 Barb. 103; *C. Academy v. McKechine*, 19 Hun, 68; 90 N. Y. 628; *Smith v. Boyd*, 101 id. 472; *Kendall v. Douglas*, 19 Hun, 584.) The fact, if it be a fact, that the deed from Campbell to the defendant was not sealed as required by the statute of this state, presents no

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obstacle to the maintenance of this action. (*Nat. Bank v. Lanier*, 7 Hun, 627; *Wadsworth v. Wendell*, 6 Johns. Ch. 230; *Grandin v. Hernandez*, 29 Hun, 460; *Wendell v. Wadsworth*, 20 Johns. 652; *Clarkson v. DePeyster*, 3 Paige, 320, 322; *Stowell v. Haslett*, 5 Lans. 382, 383; 57 N. Y. 637; 3 Hun, 555; 66 N. Y. 635; Code Civ. Pro. § 1207; *Durand v. Hankerson*, 39 N. Y. 287.) The notaries' certificates were properly admitted. (Code Civ. Pro. §§ 923, 925; *McAndrews v. Radway*, 34 Hun, 511; *Ross v. Bedell*, 5 Duer, 462; *Baker v. Morris*, 25 Barb. 138; *Hartford Bank v. Stedman*, 3 Conn. 489; *Bank of Geneva v. Howlett*, 4 Wend. 329; *Eagle Bank v. Hathaway*, 5 Metc. 213; *S. F. Bank v. Townley*, 107 Mass. 444.) The exceptions to the rulings of the court admitting in evidence the statutes and reports of Connecticut are not well taken; the evidence was competent. (Code Civ. Pro. § 942; *McCartney v. Bostwick*, 32 N. Y. 53; *Ballou v. Jones*, 13 Hun, 631; *Kamp v. Kamp*, 46 How. Pr. 143.) The exceptions to the admission in evidence of the records of the courts of Connecticut are not well taken. (U. S. R. S. 170, § 905.) The defendant having appeared in the action was properly personally charged with the costs. (Code Civ. Pro. §§ 424, 1216, 1217.) The form of the judgment directing a sale of the lands is proper. (*C. C. Bank v. White*, 6 N. Y. 255.)

S. Brown for respondent. Even if the defendant, by the alleged conveyance to her, acquired title to the land and the conveyance was fraudulent (which is denied), still the plaintiff was not entitled to maintain this action. (Code Civ. Pro. §§ 1871, 1872; *Crippen v. Hudson*, 13 N. Y. 161, 488; *Dunlevy v. Tallmadge*, 32 id. 457; *Adee v. Bigler*, 81 id. 349, 351; *Loomis v. Tift*, 16 Barb. 541; *Evans v. Hill*, 18 Hun, 465; *Adsit v. Sandford*, 23 id. 45, 49; 87 N. Y. 585; *Bank v. Olcott*, 46 id. 12; *Allyn v. Thurston*, 53 id. 622; *Estes v. Wilcox*, 67 id. 264; *Geery v. Geery*, 63 id. 252; *McCartney v. Bostwick*, 32 id. 53.) The assignee of Wetmore, under said law of 1858, became vested with the right and is entitled to maintain an

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action (assuming the finding as to the alleged fraud was correct) to set aside the conveyance. (*Spring v. Short*, 90 N. Y. 538; *Crouse v. Frothingham*, 97 id. 105; *Raymond's Appeal*, 28 Conn. 49.) By the provisions of chapter 314 of the Laws of 1858, an administrator is also authorized to bring an action as well as an assignee to set aside fraudulent conveyances. If the assignee did not take the right under this statute as trustee to prosecute an action therefor, then an administrator may be appointed and he can do so. (Code Civ. Pro. §§ 2476, 2479, 2793; *Barton v. Hosner*, 24 Hun, 467; *Southard v. Benner*, 72 N. Y. 427.) Plaintiff sought, in defiance of the statute, to gain a preference over the other creditors of Wetmore. The judgment at Special Term gave the bank a right to collect its debt to the exclusion of the other creditors. This was erroneous. (Code Civ. Pro. § 2793; *Lichtenberg v. Herdtfelder*, 103 N. Y. 302; *Crouse v. Frothingham*, 97 id. 114; *Harvey v. McDonnell*, 113 id. 526.) If we assume for the argument that Arther C. Wetmore had title to the lands described in the complaint, as claimed by the plaintiff, then there is no evidence to show that the defendant ever acquired any title or interest in the same. (*Morss v. Salisbury*, 48 N. Y. 643, 644; *N. Bank v. Lainer*, 7 Hun, 627; Story's Eq. Juris. §§ 176, 433, 706, 787, 793, 973, 987; Laws of 1848, chap. 195; Laws of 1856, chap. 61; Laws of 1867, chap. 585; *Fryer v. Rockefeller*, 63 N. Y. 268-272; *Gillett v. Stanley*, 1 Hill, 123, 126, 127; *Smith v. Tin*, 14 Abb. [N. C.] 452; Code Civ. Pro. § 923; *Bank of Rochester v. Gray*, 2 Hill, 227, 231; *Bank of Vergennes v. Cameron*, 7 Barb. 145, 148; *Kirtland v. Wanzer*, 2 Duer, 278; *Lawson v. Pinkney*, 8 J. & S. 187.)

BRADLEY, J. The question *in limine* is whether the plaintiff had any standing in court to enable it to attack, as fraudulent against the creditors of the grantor, the conveyance made by Abner C. Wetmore to his wife, the defendant, through a third person, of the land in question situated in this state; and that proposition arises on the fact that no execution had been issued and returned unsatisfied founded upon any judgment recovered

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by the plaintiff upon the debt due to it from such grantor. The action certainly could not, as a creditor's bill, under the statute, be maintained, because recovery of a judgment and the return unsatisfied of an execution issued upon it, are essential prerequisites for that purpose. (2 R. S. 173, § 38; Code, § 1871.) And it has become the settled rule in this state not to dispense with those preliminary proceedings at law, although it may be made to appear by evidence that no benefit could result to the creditor from them. (*Estes v. Wilcox*, 67 N. Y. 264; *Adsit v. Butler*, 87 id. 585.) This is not founded upon any purpose of the statute to repeal or curtail the common-law equity powers of the court, not inconsistent with the statute, to investigate the conduct of debtors in respect to their property in fraud of creditors, and to grant relief. The statute did not purport to do that, but provided that "the powers and jurisdiction of the Court of Chancery are co-extensive with the powers and jurisdiction of the Court of Chancery in England, with the exceptions, additions and limitations, created and imposed by the Constitution and laws of this state." (2 R. S. 173, § 36.) In some of the states the issue and return of execution preliminary to the action in equity is not required when it clearly appears that it would be utterly fruitless; and the same doctrine has been declared in the United States Supreme Court (*Case v. Beuregard*, 101 U. S. 690). The rule in this state, in some sense limiting the exercise of jurisdiction of the court so as to bring within its application all cases having in their purpose or relief sought, the nature of statutory creditor's bills does not necessarily rest upon a want of equitable power of the court or its denial, but rather is adopted as a rule governing and regulating the exercise by the court of jurisdiction within its equitable powers. It has the merit of uniformity, and in effect relieves a case from any uncertainty as to what would have resulted from the use of an execution if one had been issued. And it is founded upon the doctrine that a court of equity will not take cognizance of a controversy which can be determined at law, and not until the remedy there is exhausted. Such has quite uniformly been the rule of the

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common law applicable to equitable jurisdictions. (*M'Dermutt v. Strong*, 4 John. Ch. 687; *Hadden v. Spader*, 20 John. 554.) But this rule is not so unrelenting as to deny to a party the interposition of the equity powers of the court when the situation is such as to render impossible the aid of a court of law to there take the preliminary steps and produce what ordinarily may be treated as the condition precedent to the application for equitable relief. This seems to be the position of the plaintiff in its relation to the remedy which it seeks by this action. The plaintiff is a bank in the state of Connecticut, and Abner C. Wetmore, who also resided there, was indebted to it. He became insolvent and made an assignment for the benefit of his creditors to a person residing in that state. The plaintiff commenced actions there to recover judgments on such debts against Wetmore, who died while they were pending, and the assignee was appointed administrator of his estate. The plaintiff sought to revive and continue the actions against the administrator, and thereupon the latter, as permitted by the law of that state, filed a plea in abatement, alleging that the estate of Wetmore was an insolvent estate in the course of settlement in the Probate Court; and that the plaintiff's causes of action were not for debts due the United States, or the state of Connecticut, or for the expenses of his last sickness or funeral charges. The court in which those actions were pending found that the allegations in abatement were true, and directed that the actions abate and be dismissed. This was a denial, pursuant to the law of Connecticut, of any right of the plaintiff to continue or maintain any action there against the administrator; and the only determination he could have of the claim against the estate was through the action taken in that respect by the Probate Court, in which jurisdiction, exercised in the manner provided by statute, was exclusive. According to the prescribed practice, that court appointed commissioners in insolvency upon Wetmore's estate, to whom the plaintiff's claim was presented, and they, by their report, allowed it at the sum of \$6,177.64. This determination of the commissioners became conclusive

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and binding upon the trustee as effectually as if it had been a recovery by action against him in a court of law. (*Loomis v. Eaton*, 32 Conn. 550; *Bailey v. Bussing*, 37 id. 349; *First National Bank v. Hartford Life, etc., Ins. Co.*, 45 id. 22.) Nothing more remained for the plaintiff to do in that state. There was a small amount of preferred claims, while those unpreferred amounted to upwards of \$28,000, and the assets were insufficient to pay the expenses of the settlement of the estate and the preferred claims. The trial court finding these facts, also found that the conveyance before mentioned was made by Wetmore after his indebtedness to the plaintiff accrued, and was made without consideration and with the intent to defraud his creditors; and that at the time of his death Wetmore had no title to any property real or personal in the state of New York. The case presented is one in which the plaintiff could recover upon his claim no judgment entitling him to have an execution issued and returned. It is not, therefore, a case within the contemplation of the statute relating to creditor's actions, and the support of the action is dependent upon the common-law powers of the court of equity. They not being taken away by the statute no reason appears why they are not available to give a party situated as the plaintiff is, a standing in court. (*Chautauqua County Bank v. White*, 6 N. Y. 236; *Scott v. M'Millen*, 1 Littel, 302; 13 Am. Dec. 239.) The subjects of fraud and trusts are peculiarly matters of equity jurisdiction, which is very comprehensive where the other tribunals cannot afford relief, and its want of it is not to be inferred from the novelty of questions presented. (*Hadden v. Spader*, 20 Johns. 564; *Lining v. Geddes*, 1 McCord's Ch. 304; 16 Am. Dec.; *McCalmont v. Lawrence*, 1 Blatch. 232.)

In *Adsit v. Butler*, the principle applicable to equitable suits to reach property disposed of in fraud of creditors, upon which the practice is founded, is recognized to be that the remedy at law must first be exhausted, and reference is made to *Bank v. Olcott* (46 N. Y. 18), where the rule is well stated. And it is upon that principle that such requirement in the

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nature of a condition precedent must be observed before seeking relief in equity. But when a party has done all that is possible for him to do to prepare the way for his case to equitable cognizance, he is not to be denied access to the only tribunal capable of granting relief, merely because he had proceeded no further than he was, without any fault or *laches* on his part, permitted to go. That would be repugnant to the maxim that "there is no wrong without a remedy." And while that maxim is not absolutely true, it expresses a principle, and it is for that rather than precedent that courts will seek in considering whether any or what remedy may be had in the administration of justice.

And analogously applicable to the question under consideration is the doctrine announced in *Shellington v. Howland* (53 N. Y. 371); *Kincaid v. Dwinelle* (59 id. 548) to the effect that when the right to recover a judgment against a corporation and the issue and return of execution, which is a condition precedent to the liability of a stockholder under the statute (L. 1848, chap. 40, 89 N. Y. 334) is defeated without fault of the creditor, the condition precedent is dispensed with. In *Shellington v. Howland* is cited *Loomis v. Tift* (16 Barb. 541), which may not be in harmony with the later cases, but the question as there decided was applicable in principle to that in the case in which it was cited. That principle is broad enough to embrace within it for the purpose of remedy, the variety of cases to which it may be applicable. The statute provides that an action may be brought by executors, administrators, assignees or other trustees to reach property transferred in fraud of creditors (L. 1858, ch. 314), yet if such officer or trustee refuses to do so, a creditor beneficially interested may bring the action, including in it as a party defendant, him so refusing. This is upon the principle of the maxim before mentioned. (*Harvey v. McDonnell*, 113 N. Y. 526.) And this rule prior to that statute was applicable to an action by a creditor of a deceased debtor represented by an executor or administrator. (*Bate v. Graham*, 11 N. Y. 237; *Hagan v. Walker*, 14 How. [U. S.] 29.) For the purpose of such an

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action by a creditor no judgment or execution is preliminarily essential. (*Harvey v. McDonnell*, *supra*.)

The plaintiff's debt was as much the subject of adjudication as it could be made so in the state of Connecticut, and as effectually against the administrator as if rendered by a court of law. The denial to the plaintiff of equitable relief cannot, therefore, under the circumstances, rest upon the fact that he had no judgment in such court, execution thereon and its return unsatisfied.

The plaintiff had no remedy available through the Connecticut assignment or assignee, in respect to the subject-matter of this action. As a rule a statutory assignee or trustee in one state takes no title to the real estate of the assignor situated in another state. (*Osborn v. Adams*, 18 Pick 245; *Hutchinson v. Perkins*, 15 N. J. Ch. 167.) The rule may be otherwise in respect to personal property which in legal theory has no *situs* distinct from the domicile of its owner. It is, however, unnecessary to pursue the consideration of the nature of that assignment further than to say, that its effect is so far controlled by the statute of Connecticut, to the effect, that real estate not within that state was excepted from the operation of the assignment made as it was with a view to insolvency. It follows that the assignment would not have covered the land in question if, at the time it was made, the title had been in the assignor. And assuming that the conveyance to the defendant was fraudulent as against the creditors of the assignor, the defendant became a trustee *ex maleficio* for them in respect to the property; and the theory upon which relief is granted to creditors is that as between the debtor making the conveyance and his creditors the fraudulent grantee takes by it no title. (*Moncure v. Hanson*, 15 Penn. St. 385; *Chataqua County Bank v. Risley*, 19 N. Y. 369.)

Since this property did not come within his trust it is unnecessary to inquire whether, if it had been otherwise he may, as the representative of the creditors, have come into the court of this state under the act of 1858, although he could not have been required to do so.

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While the right of an assignee in this state to thus represent the creditors of his assignor and in their behalf seek such relief, is given by statute, it is a mere enlargement of his powers in respect to property only, which, but for the conveyance, would, unaided by the statute, come within his trust.

Inasmuch as this land could not, for any purpose, be treated as within the subject-matter of the trust created by the assignment amplified by the statute, there could be no support for remedy through the action of the Connecticut assignee in the courts of this state. This would be so if there were no limitation to that effect expressed in the statute. But it does, by its terms, thus confine the action of an assignee for such relief to the subject of the trust within the assignment, as such trust is broadened in its effect and in the power of its execution, but not extended beyond the limits of the assignment by the statute. (L. 1858, ch. 314.)

There is a further question having relation to the character and extent of the relief which could be granted in this action. The plaintiff, having no lien upon the property, could not, after the death of Wetmore, obtain any preference over the other creditors of the deceased, and the action can be effectual only as one for the benefit of the plaintiff and such other creditors. The complaint proceeds solely in behalf of the plaintiff, and demands relief for its benefit alone. Assuming that this was a defective pleading in its statement of the purpose of the action and relief, it was not a failure to state facts sufficient to constitute a cause of action, and the defect was available to the defendant only by demurrer or answer. (Code, §§ 488, 499.) This was not done, and for that reason the question was not presented to the court for consideration. (*Loomis v. Tift*, 16 Barb. 541.)

As the defendant answered the complaint, judgment to be directed is not controlled by the relief demanded. (Code, § 1207.) And although the action appears to have been prosecuted for the benefit of the plaintiff alone, the court may direct such judgment as, upon the facts, should be rendered in behalf of the plaintiff and other creditors. (*Thompson v.*

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Brown, 4 John. Ch. 619, 643; *Benson v. LeRoy*, Id. 651.) This can be done (in the event of recovery by the plaintiff) by means of an interlocutory judgment, by which, in the manner directed, creditors may have the opportunity of presenting their claims with a view to the distribution of the proceeds of the property.

The final judgment was, therefore, improperly directed by the trial court for the plaintiff in his behalf only, and was properly reversed by the court below, but the direction there of final judgment for the defendant was error.

The judgment of the General Term should be reversed so far as it was for the defendant, and modified by granting a new trial, costs to abide the event.

FOLLETT, Ch. J. (dissenting). A transfer of real or personal property which is fraudulent as to creditors, nevertheless divests the transferer of his title to the subject of the transfer, and he can never recover it by action, nor thereafter vest by contract or by will a third person with any right to or interest in it; and upon his death no title or right of action in respect to it passes from him to his heirs or next of kin, nor does his administrator acquire any title to the property or right to recover it by virtue of any succession in interest. The fraudulent transferee holds the legal title as a trustee *ex maleficio* for the benefit of defrauded creditors, and they only, or some person representing them, can reach the property and subject it to the payment of the debts of the fraudulent transferer. When an insolvent of this state makes a voluntary or fraudulent conveyance of land, and thereafter makes within this state a general assignment for the benefit of creditors to an assignee within this state, the latter acquires no right to avoid the previous voluntary or fraudulent conveyance by virtue of any title, interest or right of action derived through the assignment from the assignor, but his right to maintain an action to set aside the previous fraudulent transfer is conferred solely by chapter 314 of the Laws of 1858. (*Southard v. Benner*, 72 N. Y. 424.) From the passage of this act, and

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until its amendment by chapter 487 of the Laws of 1889, the right to subject property fraudulently transferred to the payment of debts was, in case the transferer had made a general assignment, in his assignee; and in case he had died it was in his personal representative. (*Spring v. Short*, 90 N. Y. 538; *Childs v. Kendall*, 30 Hun, 227; aff'd 101 N. Y. 625; *Lichtenberg v. Herdtfelder*, 103 id. 302; *Harvey v. McDonnell*, 113 id. 526; *Lore v. Dierkes*, 19 J. & S. 144; *S. C.* 16 Abb. [N. C.] 47; *Swift v. Hart*, 35 Hun, 128.)

It is insisted in behalf of the plaintiff that this Connecticut assignee did not acquire a right under the statute to set aside the conveyances and recover the avails of the land, because it is urged that the Connecticut assignment could not transfer to the assignee the title to land in this state. It has been shown, we think, that an assignee does not acquire his cause of action by virtue of the assignment, and the statute does not vest him with title to the property fraudulently conveyed, but with a chose in action, or with a right by an action to subject it through a judicial sale to the payment of the defrauded creditors. The statute does not limit the right of action to an assignee under an assignment executed in this state, nor to an assignee residing within this state, and it was not the intent of the legislature to create a remedy for fraudulent conveyances by its citizens, and not a remedy for like practices by citizens of other states. The right of foreign assignees for the benefit of creditors to prosecute actions in this state has been frequently recognized by our courts. (*Slatter v. Carroll*, 2 Sandf. Ch. 573; *Ackerman v. Cross*, 40 Barb. 465; *Matter of Accounting of Waite*, 99 N. Y. 433; *Phelps v. Borland*, 103 id. 409.) The assignee of Abner C. Wetmore acquired the right under the statute to set aside the conveyance, and the plaintiff has neither alleged nor proved facts authorizing him to bring this action. It is not alleged that the assignee has been requested or has refused to bring an action; he is not made a party defendant, and this action is not brought to recover in the right of the assignee for the benefit of all of the defrauded creditors, and it cannot be maintained. (*Harvey*

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v. *McDonnell, supra.*) It is not now material to determine whether, under the laws of Connecticut, the administrator has succeeded to the rights of the assignee.

The judgment should be affirmed, with costs.

All concur with BRADLEY, J., except FOLLETT, Ch. J.. dissenting, and POTTER, J., not voting.

Judgment modified so as to grant a new trial

124 256
126 190

THOMAS W. PEARSALL, Respondent, v. THE WESTERN UNION
TELEGRAPH COMPANY, Appellant.

When a telegraph company receives without conditions, a message for transmission, among the other obligations implied is the duty on its part to exercise due diligence to accurately transmit and promptly deliver the message; it does not insure accurate transmission and prompt delivery, but undertakes to exercise due diligence in these respects.

In an action against a telegraph company for damages for failing to accurately or promptly deliver a message, the plaintiff makes out a *prima facie* case of negligence by proving the delivery to it of the message, and that it was inaccurately or not promptly delivered.

A telegraph company incorporated under the General Telegraph Act (Chap. 265, Laws of 1848, as amended) of this state may, by contract, limit its liability for mistakes or delays in the transmission or delivery or for non-delivery of messages, caused by the negligence of its servants if the negligence be not gross, to the amount received for sending the dispatch; but such a company cannot, by notice, limit its liability in this respect, unless it is brought to the personal knowledge of the sender of the message and he assents to it. (BRADLEY and BROWN, JJ., dissenting).

Breece v. U. S. Tel. Co. (45 Barb. 274; 48 N. Y. 132), limited.

MacAndrew v. E. Tel. Co. (17 Com. B. 8), questioned.

Clement v. W. U. Tel. Co. (137 Mass. 463), distinguished.

A shareholder in a corporation is not chargeable with constructive notice of resolutions adopted by the board of directors, or of provisions in the by-laws regulating the mode in which its business shall be transacted with its customers, and when dealing with the corporation as a customer his rights are not limited by its regulations or by-laws not brought to his knowledge.

Plaintiff, who was a member of a firm of stockbrokers doing business in the city of New York, while absent from the city, delivered a telegram

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to defendant, directed to his firm, written upon a sheet of blank paper, directing the purchase of certain shares of stock. Through the mistake of the operator, the message as sent, was directed to plaintiff individually, and in consequence it remained unopened until his return the next day after its receipt, when the purchase was made; the stock, however, had meanwhile risen in the market. *Held*, that defendant was chargeable with negligence; and that plaintiff was entitled to recover as damages, the difference between the market value of the stock at the time of the receipt of the message and the sum paid for it.

Defendant proved that it had, for a long time previous to the sending of the message, used a blank form upon which messages were usually written. The blank contained printed matter in the form of an agreement between the sender of the message and the company to the effect that the company should not be liable for mistakes or delays in the transmission or delivery or for non-delivery of messages beyond a certain amount specified. Plaintiff testified in substance that he had been familiar for a long time with the general appearance of the blanks, had frequently sent messages written thereon, and had them lying on his office table ready for use, but that he never in fact, before sending the message in question, read any of the printed matter or had any knowledge of the terms thereof. The court ruled that the terms were not binding on the plaintiff. *Held* (BRADLEY and BROWN, JJ., dissenting), no error.

Reported below, 44 Hun, 582.

(Argued October 24, 1890; decided January 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 13, 1887, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

This action was brought to recover damages alleged to have been caused by defendant's failure to transmit correctly a telegraphic message.

In July, 1884, the plaintiff was a member of the firm of T. W. Pearsall & Co., bankers and brokers, engaged in business at the Mills Building, No. 17 Broad street in the city of New York. At about 8 o'clock in the forenoon of July 31, 1884, the plaintiff wrote on a sheet of blank paper and delivered to the telegraph operator, at the station of the Long Island railroad at Great Neck, the following telegram:

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"GREAT NECK, L. I., *July 31st.*

"T. W. PEARSALL & Co., Mills Building, New York city :

"Buy one thousand Western Union Telegraph.

"T. W. PEARSALL"

The message was not prepaid, but it was delivered at the office of T. W. Pearsall & Co. before 10 o'clock in the forenoon of the same day where the charge of twenty-five cents for its transmission was paid. The operator who received the message at and transmitted it from Great Neck, addressed it to "T. W. Pearsall, Mills Building, New York city," and it was so received by the receiving operator in New York, so written out on defendant's blank form No. 1, sealed in an envelope and addressed "T. W. Pearsall, Mills Building, New York city." The following is a copy of the message as transmitted from Great Neck and as delivered :

"Form No. 1. The Western Union Telegraph Company.

"This company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message. Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeatd messages beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after sending the message. This is an unrepeatd message, and is delivered by request of the sender under the conditions named above.

"THOMAS T. ECKERT, *Manager.*

"NORVIN GREEN, *President.*"

"6		8.47	8.34	
Number 1	Sent by Jm	Rec'd by Fg	7 Collect	Check Delivered from 16 Broad Street.

"Received at the Western Union Building, 195 Broadway, New York, July 31, 1884.

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"Dated GREAT NECK DEPOT, L. I., 31.

"To T. W. PEARSALL,

"Mills Building, N. Y. :

"Buy one thousand Western Union Telegraph.

"T. W. PEARSALL"

No person connected with the office of T. W. Pearsall & Co. had authority to open telegrams addressed to the plaintiff individually, and this one remained unopened until about 10 o'clock, A. M., of August first, when the plaintiff reached his office, opened and read the message. The result was that the shares ordered were not purchased July thirty-first, and on the morning of August first they had risen in the market so that they sold for \$1,700 more than they did on the morning of the day before, and the plaintiff then actually purchased that number of shares and paid the market rate.

This action was brought to recover the sum of \$1,700. The defendant by its amended answer admits that the message was delivered at its office at Great Neck, L. I., to a son of its agent, and by the letter of its general manager, admits that the error in its transmission was that of the operator at Great Neck, but it alleges that at this time, and for a long time previously, the defendant was using a blank upon which messages were usually written which contained the following printed matter :

"Form No. 2. The Western Union Telegraph Company.

"All messages taken by this company are subject to the following terms :

"To guard against mistakes or delays, the sender of a message should order it repeated, that is, telegraphed back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed, between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for

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mistakes or delays in the transmission or delivery, or for non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

"Correctness in the transmission of messages to any point on the lines of this company can be insured by contract, in writing, stating agreed amount of risk, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz., one per cent for any distance not exceeding 1,000 miles, and two per cent for any greater distance. No employe of the company is authorized to vary the foregoing.

"No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender.

"Messages will be delivered free within the established free delivery limits of the terminal office — for delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

"The company will not be liable for damages in any case where the claim is not presented, in writing, within sixty days after sending the message.

"THOS. T. ECKERT, *General Manager*.

"NORVIN GREEN, *President*."

It is also alleged in the answer that plaintiff had notice of those terms and conditions.

Upon the trial, the plaintiff testified: "I am familiar with the general appearance of the blanks, with the printed heading, which the Western Union Telegraph Company furnishes to persons whose business it desires, and have been so for a

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good many years. I have frequently sent messages written on such blanks. Bundles of such papers are lying on the table in my office, ready of access to anyone who desires to send a message by telegraph. There is quite a parcel of them there always in full view. I have been in the habit of taking blanks from that pile and writing messages on them and sending them myself, and I had been previous to the time this message was written on the 31st of July, 1884. * * * Q. Did you ever, in point of fact, before sending this message, read any of this printed matter that is at the head of the blanks in your office? A. No, sir. Q. Had you, in any way, knowledge of the terms of those conditions? A. No, sir." On the trial, the defendant offered in evidence blank form No. 2, and insisted that the plaintiff was bound by its terms, but the court rejected the offer and ruled that the terms were not binding on the plaintiff. But two questions were submitted to the jury: (1) Whether the defendant was negligent in transmitting the message. (2) The amount of damages. The jury returned a verdict for \$1,757.86, upon which a judgment was rendered which was affirmed by the General Term, from which the defendant appeals to this court.

Burton N. Harrison for appellant. It is not necessary that there should have been a special and express contract in writing, in this particular case, signed by the plaintiff, agreeing that the company should not be held in damages for such a mistake as occurred in the message, in excess of the tolls he had paid, unless he should order and pay for repetition of his message; all that was necessary for the protection of the company was that the company's regulation on the subject should have been brought to plaintiff's notice before this message was sent. (Laws of 1848, chap. 265, § 4; *Schwartz v. A. & P. T. Co.*, 18 Hun, 158; *Breese v. U. S. T. Co.*, 48 N. Y. 141; *Baldwin v. U. S. T. Co.*, 45 id. 751; *Kiley v. W. U. T. Co.*, 109 id. 236; *Becker v. T. Co.*, 11 Neb. 91; *Ellis v. A. T. Co.*, 13 Allen, 226-228.) It is quite immaterial, upon the evidence in this case, that the particular telegraph message, in the

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case now at bar, was written by the plaintiff upon a piece of ordinary note paper, and not upon one of the company's special blanks with the rules and regulations on this subject printed at the head of the blank. The plaintiff must be held to have known the regulations in question, and to be bound by them. (*U. S. T. Co. v. Gildersleeve*, 29 Md. 247; *W. U. T. Co. v. Buchahan*, 35 Ind. 334; *T. Co. v. Carew*, 15 Mich. 536; *Wolf v. W. U. T. Co.*, 62 Penn. St. 83; *Redpath v. T. Co.*, 112 Mass. 73; *Grace v. Adams*, 100 id. 507; *Rice v. Dwight*, 2 Cush. 87; *Womack v. W. U. T. Co.*, 58 Tex. 180; *Belger v. Dinsmore*, 51 N. Y. 170; *Hill v. City of Syracuse*, 73 id. 352.) The plaintiff was a member and shareholder of the company at the time when the message in question was written and sent; he was for that reason, independent of every other, chargeable with knowledge of and was bound by the resolutions, rules and regulations of the company requiring all messages to be written on the ordinary telegraph blanks, and limiting the company's liability to a return of the tolls paid for possible mistakes in unrepeatd messages. (Lindley on Part. 206, 207, 208, 209; *O., etc., R. R. Co. v. Frost*, 21 Barb. 541; *U. H. Co. v. Mersee*, 79 N. Y. 454; Angell & Ames on Corp. § 359; Greenl. on Ev. §§ 484, 493; Abb. Tr. Ev. 48; *Allen v. Coit*, 6 Hill, 318; *Coles v. I., etc., Ins. Co.*, 18 Ia. 431; *Billings v. Trask*, 30 Hun, 318; *Blake v. Griswold*, 103 N. Y. 434; *T. Co. v. McKean*, 10 Johns. 156; Laws of 1848, chap. 265, § 11; *Clement v. W. U. T. Co.*, 137 Mass. 463.) The court erred in denying defendant's motion for a nominal verdict, as the omission of "& Co." from the address is not in itself *prima facie* evidence of negligence on the part of the company. (*Ellis v. A. T. Co.*, 13 Allen, 226, 228; *Curtis v. R., etc., R. R. Co.*, 18 N. Y. 535; *Holbrook v. U., etc., R. R. Co.*, 12 id. 236; *Womack v. W. U. T. Co.*, 58 Tex. 181.) The contention of counsel for plaintiff that defendants are to be charged with negligence here, because the person to whom plaintiff's friend handed the message at Great Neck depot, and who assumed to telegraph it thence, was a "mere boy without any sufficient education in telegraph business,

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with no one to look after him, and with no experience or qualifications fitting him for the place," was erroneous. (*Althorff v. Wolfe*, 22 N. Y. 365; *Milligan v. Wedge*, 12 Ad. & El. 737; Addison on Torts, 105; *Mitchell v. L. M. Ins. Co.*, 51 Penn. St. 411.) There was nothing in the message itself to inform the defendant of the importance of the order it gave, or indeed of its meaning. (*Kiley v. W. U. T. Co.*, 39 Hun, 164; *Williams v. Reynolds*, 34 L. J. [Q. B.] 221.) The damages claimed in this case were and are uncertain, speculative — contingent upon a thousand possibilities no man can estimate with any certainty or confidence; and such alleged damages are never allowed by the courts of this state to be recovered in a case like this. The jury cannot be asked to guess; they are to try the case on evidence, not upon mere speculative conjecture. (*Griffen v. Colver*, 16 N. Y. 490; *Kiley v. W. U. T. Co.*, 39 Hun, 161, 164; 33 Wis. 558; *Baker v. Drake*, 53 N. Y. 216; 101 id. 205.) The court below erred in answering in the negative the inquiry of the jury: "Can the jury consider the question of the want of diligence on the part of the plaintiff in not having required the message he sent to be repeated or insured." (*Whelan v. Lynch*, 60 N. Y. 472.)

Thomas G. Shearman for respondent. Telegraph companies are common carriers. (*T. Co. v. Texas*, 105 U. S. 460; *Abraham v. W. U. T. Co.*, 23 Fed. Rep. 315; *Baldwin v. U. S. T. Co.*, 1 Lans. 125; Laws of 1855, chap. 559; 2 R. S. [7th ed.] 1721.) They cannot refuse messages. (*Smith v. W. U. T. Co.*, 83 Ky. 104; *Marr v. W. U. T. Co.*, 85 Tenn. 529.) Their liability cannot be limited by notice. (*Kirkland v. Dinsmore*, 62 N. Y. 175; *Dorr v. N. J. S. N. Co.*, 11 id. 485; *Browning v. L. I. R. Co.*, 2 Daly, 117; *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, Id. 251; *Powell v. Myers*, 26 id. 591; *Nevins v. B. S., etc., Co.*, 4 Bosw. 225; *C., etc., R. Co. v. Belknap*, 21 Wend. 354; *E. Co. v. Caldwell*, 21 Wall. 264; *McMillan v. M., etc., R. Co.*, 16 Mich. 79; *Baldwin v. U. S. T. Co.*, 1 Lans. 125, 136; *DeRutte v. A., etc., T. Co.*, 1 Daly, 547; *Abra-*

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ham v. W. U. T. Co., 23 Fed. Rep. 315.) Evidence of custom is inadmissible. (*Coxe v. Hisley*, 19 Penn. St. 243; *Browning v. L. I. R. Co.*, 2 Daly, 117; *Clyde v. Graver*, 54 Penn. St. 251.) A stipulation relieving a carrier from liability must be explicit. (*Alexander v. Green*, 7 Hill, 533, 558; *Mynard v. S., etc., R. Co.*, 71 N. Y. 181; *Magnin v. Dinsmore*, 56 id. 168; *Blair v. E. R. Co.*, 66 id. 313; *Steinway v. E. R. Co.*, 43 id. 123.) The refusal of the court to admit in evidence the printed headings to certain telegraph blanks was right. (*Clyde v. Graver*, 54 Penn. St. 251; *McMillan v. M., etc., R. Co.*, 16 Mich. 79; *E. Co. v. Caldwell*, 21 Wall. 264; *Kirkland v. Dinsmore*, 62 N. Y. 175; *Blossom v. Dodd*, 43 id. 264.) The rules and regulations which the defendant offered in evidence were properly excluded as not binding upon the plaintiff, and the exception taken to that decision is unfounded. (*Mynard v. S. R. Co.*, 71 N. Y. 180; *Magnin v. Dinsmore*, 56 id. 168; *Steinway v. E. R. Co.*, 43 id. 123; *Haines v. Brown*, 36 N. H. 544; *Marriage v. Lawrence*, 3 B. & A. 144; *People v. L. S. R. Co.*, 11 Hun, 1; *People v. Walker*, 9 Mich. 328; *Rex v. M. T. Co.*, 2 B. & A. 115; *Dunham v. Trustees, etc.*, 5 Cow. 465.) The defense that the firm of T. W. Pearsall & Co. was a stockholder in the defendant company, and was, therefore, subject to all by-laws which should be adopted by it, is untenable. (*Rice v. P. Club*, 52 Mich. 87; *Bergman v. S. P. B. Assn.*, 29 Minn. 275; *Taylor on Part.* § 561.) An error in a message is proof of negligence. (*Baldwin v. U. S. T. Co.*, 45 N. Y. 744, 751; *Ayer v. W. U. T. Co.*, 79 Me. 493; *Bartlett v. W. U. T. Co.*, 62 id. 221; *Rittenhouse v. I. L. T. Co.*, 44 N. Y. 265.) The court correctly refused to charge that there was nothing in the evidence to justify the finding by the jury that there had been gross negligence or willful misconduct on the part of the defendant. (*W. U. T. Co. v. Buchanan*, 35 Ind. 429.) The rule of damages was correct. (*Dana v. Fiedler*, 12 N. Y. 40; *Walrath v. Redfield*, 18 id. 467; *Dox v. Day*, 3 Wend. 356; *Decker v. Matthews*, 12 N. Y. 313; *Caldwell v. Murphy*, 11 id. 416; *Jones v. Osgood*, 6 id. 233; *Sanford v. Crocheron*, 8 Civ. Pro.

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Rep. 146; *Rittenhouse v. Tel. Co.*, 44 N. Y. 263; *Leonard v. Tel. Co.*, 41 id. 544; *U. S. T. Co. v. Wenger*, 55 Penn. St. 262; *Squire v. Tel. Co.*, 98 Mass. 232; *True v. Tel. Co.*, 60 Me. 9; *W. U. T. Co. v. Hall*, 124 U. S. 444.) The damages were not speculative. (*W. U. T. Co. v. Hall*, 124 U. S. 444; *Hibbard v. W. U. T. Co.*, 33 Wis. 558; *Kiley v. W. U. T. Co.*, 39 Hun. 158.)

FOLLETT, Ch. J. This action was tried and a recovery had at Circuit, which was sustained at the General Term on the theory that the contract between the parties was the one implied by law when a telegraph company receives, without conditions, a message for transmission. Among other obligations implied in such a case, is the duty to accurately transmit and deliver to the addressee the message received, which in this case defendant failed to do, as it admits, by reason of the mistake of the operator who received and undertook to send forward the communication. Under such a contract a telegraph company does not insure the accurate transmission and delivery of a dispatch, but undertakes to exercise due diligence to do so.

The question has several times arisen whether, in actions for damages against such corporations for failing to accurately or promptly deliver communications, a plaintiff makes out a *prima facie* case by proving the contract and its breach, or whether the plaintiff must go further and give evidence of some negligent act of omission or commission on the part of the corporation or of its agents.

Rittenhouse v. Independent Line of Tel. (1 Daly, 474; 44 N. Y. 263), was brought to recover damages for failing to correctly transmit a message, and it was held that a *prima facie* case was made out by showing that the communication delivered was not a copy of the one sent.

In *Baldwin v. U. S. Tel. Co.* (45 N. Y. 744), a dispatch was received for "Erie Darling," but as transmitted it was addressed to "E. R. Cooley" and was not delivered to Dar-

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ling for several days; and it was held that by proof of these facts a *prima facie* case was established.

In *Breese v. U. S. Tel. Co.* (48 N. Y. 132), it was proved that a message directing the purchase of \$700 in gold was changed to one ordering \$7,000 in gold, and it was said, though not necessary for the decision of the case, that it was not *prima facie* proof of negligence.

The rule laid down in the first two cases has been followed by the courts of other states and is approved by the text writers. (Whart. on Neg. § 756; Gray Tel. §§ 26, 53, 54, 77; Abb. Tr. Ev. chap. 32; 2 Green. Ev. § 222a, note; 2 Shear. & Red. Neg. § 542; 2 Thomp. Neg. 837; 3 Suth. Dam. 295.)

The court correctly instructed the jury that the evidence made out a *prima facie* case of negligence against the defendant.

In the cases holding that telegraph companies are only liable when grossly negligent, there were contracts exempting them from all liability, except to refund the tolls received for negligently sending or delivering the communication. Without considering whether there is any legal distinction to be drawn between gross and ordinary negligence in such cases, it is sufficient to say that these cases are not germane to the question in the case at bar.

At the time this message was received the plaintiff was one of defendant's shareholders, and it was offered to be proved, in defense of the action, that the board of directors had adopted a resolution that it would not be liable for mistakes or delays in the transmission or delivery of unrepeatd messages, and would not be liable for damages arising from delays in the transmission or delivery of a repeated message beyond an amount specified; and it was insisted that he being a shareholder was chargeable with notice of this resolution. The regulations were excluded and the defendant excepted. In this there was no error, for a shareholder in a corporation is not chargeable with constructive notice of resolutions adopted by the board of directors, or by provisions in the by-laws regulating the mode in which its business shall be transacted with its customers, and the plaintiff's rights arising out of defendant's

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contract to transmit the message were in no wise limited by its regulations or by-laws not brought to the plaintiff's knowledge. (*Hill v. Manchester & Salford Water Works Co.*, 5 B. & Adol. 866; *Rice v. Penninsular Club*, 52 Mich. 87; *Mor. Corp.* §§ 500, 500a.)

The court instructed the jury that the plaintiff was entitled to recover the difference between the market value of the stock on the morning of July thirty-first and the sum which he paid for it on the morning of the following day. It distinctly appeared on the face of the dispatch that it was an order to buy shares; and in such cases the liability of the corporation not being limited by a special contract, the measure of damages is the difference between the market value of the shares at the time when the dispatch should have been delivered and the sum paid for them in the market on the receipt of the message. (*Rittenhouse v. Tel. Co.*, 44 N. Y. 263; *Leonard v. Tel. Co.*, 41 id. 544; *Squire v. W. U. Tel. Co.*, 98 Mass. 232; *Western Union Tel. Co. v. Hall*, 124 U. S. 444; *U. S. Tel. Co. v. Wenger*, 55 Pa. St. 262; 3 Suth. Dam. 307.)

It is insisted on behalf of the defendant that the court erred in excluding from the consideration of the jury the conditions printed on Form No. 2. It is settled that a telegraph company, incorporated under the general statutes of this state may, by contract, limit its liability for mistakes or delays in the transmission or delivery, or for the non-delivery of messages caused by the negligence of its servants, if the negligence be not gross, to the amount received for sending the dispatch. (*Breese v. U. S. Tel. Co.*, 48 N. Y. 132; *Kiley v. W. U. Tel. Co.*, 109 id. 236.) But it has never been decided by the court of last resort that such a company can, by notice, limit its liability for such mistakes or delays.

Breese v. U. S. Tel. Co. (45 Barb. 274; 48 N. Y. 132), arose out of the erroneous transmission of a message written on a blank containing printed conditions, and it was held that a party by writing his dispatch on the blank assented to the printed terms and conditions. In discussing the question it was said: "They (telegraph companies) can thus limit their liability for

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mistake not occasioned by gross negligence or willful misconduct, and this they can do by notice brought home to the sender of the message, or by special contract entered into with him." We think this remark cannot be regarded as an adjudication that the common-law liability of a telegraph company may be limited by a mere notice, unless it is brought to the personal knowledge of the sender of the message, and he is shown to have assented to it. In this state a common carrier may, by an express contract with the shipper, exempt itself from liability for loss or damage occasioned by the negligence of its servants. (*Wells v. N. Y. C. R. R. Co.*, 24 N. Y. 181; *Bissel v. N. Y. C. R. R. Co.*, 25 id. 442; *Poucher v. N. Y. C. R. R. Co.*, 49 id. 263; *Cragin v. N. Y. C. R. R. Co.*, 51 id. 61; *Spinetti v. Atlas S. S. Co.*, 80 id. 71; *Mynard v. Syr., B. & N. Y. R. R. Co.*, 71 id. 180; *Wheeler on Carriers*, 76, 86.) But a common carrier cannot, by notice, limit its common-law liability to safely carry and deliver goods without evidence of the shipper's assent to the limitation proposed. (*Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, Id. 251; *Clark v. Faxton*, 21 id. 153; *Camden, etc., Trans. Co. v. Belknap*, Id. 354; *Dorr v. N. J. Steam Nav. Co.*, 11 N. Y. 485; *Blossom v. Dodd*, 43 id. 264.)

Telegraph companies organized like the defendant under chapter 265 of the Laws of 1848, and the acts amendatory thereof and supplementary thereto, like companies incorporated for the carriage of goods and passengers, owe duties to the public. Such corporations, like railroads, may exercise the right of eminent domain, and they are required to exercise due diligence to transmit with celerity and skill all messages delivered to them, subject to such reasonable rules as may be adopted to protect their rights and facilitate the performance of their duties. They, like common carriers have become necessary instrumentalities for conducting the business of the country, and they owe the same duty to the public and, we think, should be held to the same rule in respect to their right to limit their liability by notice. In this state the doctrine

that the common-law liability could not be limited without an express contract has been applied to individuals and firms acting as common carriers, as well as to corporations.

In *MacAndrew v. Electric Tel. Co.* (17 Com. B. 3), it was said that the common-law liability of a telegraph company may be limited by notice, but the report of the case does not show whether the message was written on a blank with or without conditions. But in England it was held that carriers could, by notice, limit their liability for the loss of goods, even in cases of gross negligence, which resulted in statutes providing that their liability could not be limited except by an express contract. (§ 6, chap. 68, 11 Geo. IV. and 1 Wm. IV; § 7, chap. 31, 17 & 18 Vic.)

In *Clement v. Western Union Tel. Co.* (137 Mass. 463), a message not written upon one of the defendant's blanks was sent to its office for transmission. It was forwarded in due time, but was not delivered by the office at which it was received. In an action brought for the recovery of damages occasioned by the failure to deliver, it appeared that the plaintiff's agent who sent the message knew the terms and conditions on which the defendant, by its rules, provided that messages should be sent over its line as set forth in the blank then in use by it, and it was held that this knowledge of the plaintiff's agent was binding upon him, and that no recovery could be had.

In the case last cited a different rule was applied to telegraph companies from the one applied by the same court to express companies. In *Gott v. Dinsmore* (111 Mass. 45) the plaintiff shipped goods by express, not taking at the time the usual receipt containing printed conditions limiting the liability of the company, with which the plaintiff was familiar, he having been in its employment and issued many such receipts. It was held that mere notice brought home to the owner of the goods, by which the carrier seeks to limit its common-law liability, and the terms of which are not expressly assented to, were insufficient to defeat a claim for loss. The court said: "Nor does the knowledge of the regulation which

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the plaintiff had previously acquired while in defendant's employment subject him to limitations imposed by the receipt." In *Ellis v. American Tel. Co.* (13 Allen, 226) the reasons are clearly and satisfactorily stated for the existence of the rule that telegraph companies are not, unless they so expressly contract, held to warrant or insure the accurate transmission or prompt delivery of messages, and are only liable for negligence. But we find no satisfactory reason in this or in any case for a rule that such companies may, by notice, limit their liability for negligence, nor do we see any in the nature of the business in which they are engaged. Carriers and telegraph companies are alike engaged in *quasi* public employments, and persons are, from necessity, compelled to employ the latter without more opportunity for choice and deliberation than when they select the former. As before shown, the liability on contract of carriers of goods which is implied by law cannot be limited by notice, and it is difficult to see why telegraph companies should be permitted to limit a much less onerous obligation by a mere notice.

The judgment should be affirmed, with costs.

BRADLEY and BROWN, JJ. (dissenting). After the blank known as Form No. 2 was put in evidence the defendant's counsel was refused permission to read to the jury the rules and regulations printed upon said blank, and which stated the condition upon which all messages were taken by the company. In substance these regulations were to the effect that the company would not be liable for mistakes in the delivery of a message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, unless the sender should order the message telegraphed back to the originating office for comparison, and for that service one-half the regular rate was to be charged in addition to the amount received for sending the message.

The defendant testified that he had no knowledge of the terms of the conditions upon the Form No. 2. But there was ample evidence in the case from which the jury could have

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found that the plaintiff knew of these regulations, and that all messages received by the company were sent over its wires subject thereto.

If the jury had so found it would have also been permissible for them to find that the message in question was sent subject to such conditions, and that the defendant's liability was limited to the amount charged for sending the message.

A special and express contract is not necessary to limit the liability of the telegraph company for mistakes in the transmission of messages, and in this respect such corporations differ from common carriers. The reasons for this distinction are very clearly pointed out in *Ellis v. American Tel. Co.* (13 Allen, 226), and in the views there expressed we concur.

In that case the message was written upon one of the blanks of the corporation, upon which was printed the rules of the company limiting its liability.

In *Clement v. Western Union Telegraph Co.* (137 Mass. 463) the message was not written upon one of the defendant's blanks, but on its delivery to the defendant it was upon a plain piece of paper. The condition upon which defendant, by its rules, provided that messages should be sent over its line as set forth in the form of a blank in use by it were, however, known to the plaintiff's agent, such blanks having been frequently used by him, and it was accordingly held that a finding was warranted that the contract was entered into subject to the stipulations contained upon such blanks, and that the plaintiff could recover only the cost of the message.

We can see no conflict between this case and *Gott v. Dinsmore* (111 Mass. 45), cited in the prevailing opinion, the latter being an action against an express company for the loss of a trunk, and was disposed of by the application of rules of law applicable to common carriers.

In this state it has been decided that a telegraph company is not a common carrier, and is not subject to the peculiar liability of common carriers. (*Breese v. U. S. Telegraph Co.*, 48 N. Y. 132; *Schwartz v. A. & P. Telegraph Co.*, 18

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Hun, 158; *Kiley v. Western Union Telegraph Co.*, 109 N. Y. 231.)

In the case last cited, in speaking of the regulations limiting the liability of the company unless the message was repeated, it was said "that a telegraph company has the right to exact such a stipulation from its customers is the settled law in this and most of the states of the union and in England.

"The authorities hold that telegraph companies are not under the obligation of common carriers. They have the right to make reasonable regulations for the transaction of their business and to protect themselves from liabilities which they would otherwise incur through the carelessness of their numerous agents and the mistakes and defaults incident to the transaction of their peculiar business.

"The stipulation printed in the blank in use in this case has frequently been under consideration in the courts and has always in this state and generally elsewhere been upheld as reasonable."

In that case the message was written upon one of the printed forms of the defendant and it was decided that the plaintiff would be held by the use of the blank and its delivery to the company, to have assented to the condition thereon although he might not have known their precise terms; and the *Massachusetts* case referred to and the *Breeze* case and *Schwartz* case were cited as authorities for such decision.

The authorities cited establish in our opinion the rule that a telegraph company may limit its liability for mistakes in the transmission of messages by reasonable regulations brought to the knowledge of its customers, and had the jury found, as they might have done upon the evidence in this case, that the plaintiff knew that such regulations had been established and that the defendant's liability was limited to the amount charged for sending the message unless it was ordered to be telegraphed back it would also have been permissible for them to find that he contracted with the defendant upon such condition. Whether the court would have been justified upon a finding of knowledge of these conditions upon plaintiff's part in hold-

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ing as a matter of law that he must be deemed to have assented to the condition, it is unnecessary to here state, in view of the fact that the judgment is to be affirmed.

The views now expressed sufficiently indicate the difference existing between the majority and minority of the court.

It was material to a proper disposition of the case that the regulations printed upon the blank put in evidence should have been read to the jury and it was error for the court to exclude them and for such error the judgment should be reversed and a new trial granted.

All concur with FOLLETT, Ch. J., except BRADLEY and BROWN, JJ., dissenting and HAIGHT J., not sitting.

Judgment affirmed.

JOHN HOREY, Respondent, v. THE VILLAGE OF HAVERSTRAW,
Appellant.

A highway, although properly laid out, if opened and worked for a part of the distance only, as described in the survey, after the lapse of more than six years, ceases, as to the part not opened, to be a highway for any purpose.

It seems, the burden of showing that a portion has so ceased to be a highway rests upon the parties claiming it.

The requirement of the statute (1 R. S. 520, § 90, as amended by chap. 311, Laws of 1861) that a highway must be opened and worked within six years, implies that it must be made passable as a highway for public travel; it need not be made a first class road, or be finished, but it must be worked sufficiently to enable the public to pass over it.

So, also, where a road has not been used and traveled as a highway for six years and has for that period been made impassable for conveyances by being fenced off, or by excavations therein, its legal character as a highway is destroyed; and this, although in the beginning of the non-user the road was rendered impassable by a trespasser.

In an action to recover damages for injuries alleged to have been caused by defendant's neglect to keep one of its streets in repair, it appeared that the street in question was regularly laid out, and up to the intersection with another street, was opened and worked; but that the portion where the accident happened was not worked and never had been used as a highway, and for more than six years had been closed by a fence across it, and there was no access thereto except from private property; also, that it had been rendered impassable for public travel by deep

124	278
142	150
124	278
168	1626

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excavations therein, and that sand and clay were excavated therefrom and carried away by private parties, without hindrance from the town officials or the public. Plaintiff entered thereon from private property. *Held*, that the *locus in quo* was not a highway; and so, that plaintiff was not entitled to recover.

Horey v. Village of Haverstraw (47 Hun, 356), reversed.

(Argued December 1, 1890; decided January 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 15, 1888, which affirmed a judgment in favor of the plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

This action was brought to recover damages arising from the alleged negligence in allowing a highway, known as Warren avenue, to remain out of repair, in consequence of which plaintiff fell and broke his leg.

The facts, so far as material, are stated in the opinion.

Calvin Frost for appellant. The place where the plaintiff fell was not a highway, and so defendant was under no obligation to keep it in repair. (*Crane v. Fox*, 16 Barb. 184; *Martin v. People*, 23 Ill. 395; *Lyon v. Munson*, 2 Cow. 426; *Christy v. Newton*, 60 Barb. 332; *Beckwith v. Whalen*, 5 Lans. 376; *Vandemark v. Porter*, 40 Hun, 397.) The plaintiff was guilty of contributory negligence and is precluded from a recovery. (*Dygert v. Schenck*, 23 Wend. 446; *Van Schaick v. H. R., etc., Co.*, 43 N. Y. 527; *Carolus v. Mayor, etc.*, 6 Bosw. 15; *Durkin v. City of Troy*, 61 Barb. 437; *Cummins v. City of Syracuse*, 100 N. Y. 637; *Owen v. H. R. R. Co.*, 35 id. 518; *Hawkins v. Cooper*, 8 C. & P. 473; *Williams v. Richards*, 3 id. 81; *Barnes v. Cole*, 21 Wend. 188; *Hatfield v. Roper*, 21 id. 615; *Spencer v. U., etc., R. R. Co.*, 5 Barb. 338; *Harlow v. Humiston*, 6 Cow. 189; *Hall v. Smith*, 78 N. Y. 480; *Riceman v. Havemeyer*, 84 id. 647; *Havens v. E. R. Co.*, 41 id. 298; *Wilcox v. R., W. & O. R. R. Co.*, 39 id. 358; *Garton v. E. R. Co.*, 45 id. 660; *Tolman v. S. B. & N. Y. R. R. Co.*, 98 id. 198; *Connolly v. N. Y. C. R. R. Co.*, 88 id. 446;

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Gonzales v. N. Y. & H. R. R. Co., 38 id. 440.) The court erred in excluding the question which tended to show that there was another way by which plaintiff could have gone to his home, not much further. (*Carolus v. Mayor, etc.*, 6 Bosw. 22.) The order laying out Warren avenue was void, because it purported to lay out a highway more than four rods in width — eighty feet. (Laws of 1801, chap. 186, § 17; Laws of 1811, chap. 97, § 2; 1 R. S. 526, § 132; *Snyder v. Plass*, 28 N. Y. 465; *Mills v. O'Dell*, 98 id. 326.) There was no sufficient proof of dedication of Warren avenue to the public. (*In re Hand St.*, 52 Hun, 206; *In re Public Parks*, 53 id. 556; *Commonwealth v. Newbury*, 2 Pick. 57; *N. F. S. B. Co. v. Beekman*, 66 N. Y. 269.) There was no sufficient user to prove a public street. There was no proof of public travel more than twenty years before the trial, 1887, and the pretended laying out was 1868. (*In re Sherwagunk Kill*, 100 N. Y. 642.)

Alonzo Wheeler for respondent. Warren avenue, the avenue in which the injury to the plaintiff occurred, was a public highway. (*Beckwith v. Whalen*, 65 N. Y. 332; *Ambrey v. Hinds*, 46 Barb. 624; *Riggs v. Phillips*, 103 N. Y. 77; *People v. Kingman*, 24 id. 560.) Defendant was chargeable with negligence. (*Todd v. City of Troy*, 61 N. Y. 507; *Sewell v. City of Cohoes*, 75 id. 45; *Russell v. Village of Canastota*, 98 id. 496.) The evidence presents a state of facts which clearly justified the court in submitting the question of contributory negligence to the jury. (*Thomas v. Mayor, etc.*, 15 Wkly. Dig. 378; *Kain v. Smith*, 89 N. Y. 375; *Palmer v. Dearing*, 93 id. 7; *Twogood v. Mayor, etc.*, 102 id. 216; *Shook v. City of Cohoes*, 23 Wkly. Dig. 4; *Bullock v. Mayor, etc.*, 99 N. Y. 654; *Evans v. City of Utica*, 69 id. 166; *Fitzgerald v. City of Binghamton*, 40 Hun, 332.) No question was raised upon the trial as to the original legal establishment of Warren avenue as a public highway, either by motion for nonsuit or by the requests to charge the jury, and so, such question cannot be raised here. (Baylies on N

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T. & App. 275; *Wellington v. Morey*, 90 N. Y. 656; *Campbell v. Birch*, 60 id. 214; *Delaney v. Brett*, 51 id. 78; *Coates v. Bank of Emporia*, 91 id. 20.)

PARKER, J. The plaintiff alleged that his injuries were occasioned by the neglect of the defendant to keep in safe and proper condition for public travel a certain street within the corporation limits known as Warren avenue.

The defendant denies that the place where the accident occurred was, at the time of its happening, a public highway.

An order laying out Warren avenue, as such, was made and filed in 1868, but defendant asserted that easterly from a point a little west of the intersection of Rockland street it had ceased to be traveled or used as a highway for six years prior thereto, and, therefore, as provided by chapter 311 of the Laws of 1861, had ceased to be a highway for any purpose.

The question is presented on this review by exceptions taken: (1) To the charge of the court that it "never ceased to be a public highway by reason of this excavation, not for an instant." (2) To the refusal of the court to charge "that if the part of Warren avenue east of Rockland street has not been traveled or used as a highway for six years before the time of the injury, such part of the street ceased to be a public highway for any purpose, and the defendant was not bound to keep it in repair."

The introduction of evidence showing that Warren avenue had been legally laid out as a highway, raised the presumption of its continuance as such. The burden of establishing that a portion of it had ceased to be a highway, therefore, rested upon the defendant. It is conceded that from a point a little west of Rockland street to Broadway it still remains a public street, but that from such point easterly towards the Hudson, the defendant asserts it had ceased to be such before the plaintiff was injured. It does not follow that because a portion of that which was originally laid out as a continuous highway remains such that all of it does. If a part of it cease to be traveled and used for a period of six years, the public in the meantime

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using some other route, such part is no longer a highway. (*Lyon v. Munson*, 2 Cowen, 426.) A highway opened and worked for a part of the distance only, as described in the survey, but not on a particular portion thereof until after the lapse of more than six years, ceases, as to such part, to be a highway for any purpose. (*Christy v. Newton*, 60 Barb. 332.) The statute which provides that "all highways that have ceased to be traveled or used as highways for six years, shall cease to be a highway for any purpose," also provides that "every highway hereafter to be laid out that shall not be opened and worked within a like period (six years), shall cease to be a road for any purpose whatever."

The provision last referred to was before this court in *Beckwith v. Whalen* (70 N. Y. 430). It appeared that the highway as laid out had been worked to some extent down to a raceway which was twice bridged and some other work done, but that over a marsh about 200 feet in all no attempt had been made to render the road passable for teams and wagons. The court said: "Highways are for public use to enable the public to pass and repass with teams and vehicles, such as are ordinarily used; and when a highway laid out shall remain unopened and unworked for six years, the statute declares that it shall cease to be a highway for any purpose. The requirement to open and work a highway, implies that it must be made passable as a highway for public travel. It need not be a first-class road, it need not be finished, but it must be sufficient to enable the public to pass over it."

While the court, in the case from which we have quoted, did not have under consideration the provision declaring that failure to use a highway for six years shall operate to destroy it, it did have before it that portion of the same section which declares that a failure to open and work a highway within six years after its laying out shall have the same effect. Its decision, therefore, seems to make clear not only the general purpose, but the scope of the entire statute.

As a road is declared not to be opened and worked, within the meaning of the statute, which is not made passable for

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teams within six years, so a road which for six years is not only not used and traveled, but is impassable for conveyances of any kind, is fenced off and the public travel by another route, presents a situation upon which the statute must operate to destroy its legal character as a highway. And it matters not that at the beginning the road was rendered impassable and fenced off by a trespasser. Indeed, such must always be the case, unless it be done by the public authorities. The public can be protected by the highway officials whose duty it is to see to it that all public highways are kept in proper condition for public travel. They are not only charged with a duty to do so, but are provided with the legal machinery necessary to prevent trespassers from doing damage to highways, and the means necessary to restore them to a safe and passable condition for travel after injury done. And if they neglect this duty or refuse to perform it for a period of six years and the traveling public acquiesce, so that in all that time no one can or does make use of the highway, it ceases to be such.

This question was not before the court in *Driggs v. Phillips* (103 N. Y. 77). It was not suggested in that case that the highway had ceased to be such because of non-user, and an obstruction to travel for six years. Plaintiff encroached upon, but did not obstruct the highway. Non-user did not result from this act. And the attention of the court was not even called to the statute which the defendants rely upon here.

The accident to the plaintiff occurred September 26, 1886, within the boundaries of a highway laid out in 1868, known as Warren avenue. At that time it extended from Broadway easterly towards the Hudson river. But at the time of the accident the road was only open and used from Broadway east to a point about 210 feet west of Rockland street, which intersected with Warren avenue from the south. There a fence was maintained across Warren avenue, and the public drove either in a southerly or northerly direction over roads which were not laid out as highways, but which they were accustomed to use. From near the fence crossing the avenue easterly past the place of the accident and for its entire length, the evidence

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shows that at the time of the accident this highway was impassable, not alone because of the fence (which had been erected as a guard to the public), but because of excavations which had been made in securing material for the manufacture of brick. In this immediate vicinity it appears that below the surface there is about twenty feet of sand, and then is reached a bed of clay. Now, from the fence east until within forty feet of the place of injury, the sand had been removed, and, still below it the clay had been excavated to a depth of about thirty feet, making a total depth, from the original surface of the road, of about fifty feet. At the point where plaintiff entered from private property within the boundaries of Warren avenue (so called) the sand had been removed, so that he was twenty feet below the original surface of the road. Westwardly for about forty feet was a bench of clay twelve feet lower still, and then was reached the line of excavation of the depth of fifty feet already referred to. Plaintiff fell from the level upon which he entered the avenue to the bench of clay twelve feet below.

In addition to a description of the condition of that which had once been laid out and used as a highway to which we have but briefly alluded, the defendant offered evidence tending to show that it was impassable for teams and had been for a period of more than six years before the injury.

Leavillette Wilson, a surveyor, sworn in behalf of the plaintiff, testified in effect, that while the highway was laid out in 1868, it was never opened and worked as a public street. That in 1875, nearly eleven years before the accident, a fence was built partly across Warren avenue, but a little further east than its present location, and that from some time in that year the street was dug away; that from 1879, the whole of the street had been excavated so that it could not be entered from Rockland street at all. The plaintiff attempted to show that as late as the year 1883 teams were driven upon the highway at the point in question. Defendant's witness VanValen, who was for a number of years president of the village, testified that not in eight or ten years has there been a place east of

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the fence across the street where a person could drive upon Warren avenue, except from private property.

We need not consider further the evidence presented by this record, for we have already gone far enough to make it appear that if the jury believed the evidence most favorable to the defendant they could have found that for more than six years previous to September 26, 1886, from the fence across Warren avenue, to the extreme easterly end thereof as originally laid out, it was impassable for teams and vehicles, that it was not traveled or used by anyone for highway purposes during that period, but was fenced off and the sand and clay excavated and carried away by private parties without hindrance by the town officials or the public.

Had they found such to be the fact the defendant would have been entitled to a verdict on the ground that the *locus in quo* was not a public highway, and, therefore, the defendant did not owe to the plaintiff the duty of keeping it in repair.

The judgment should be reversed.

All concur.

Judgment reversed.

THE ELMIRA IRON AND STEEL ROLLING MILL COMPANY,
Appellant, v. NATHANIEL C. HARRIS, Impleaded, etc.,
Respondent.

One who has been a known and recognized partner in a firm, but who has withdrawn therefrom, can only relieve himself from liability for subsequent transactions between his former partner in the firm name and third persons, who are unaware of the change, by giving notice of his withdrawal.

A notice of dissolution published in a local newspaper, only affects those who previously had not dealt with the firm, but thereafter deal with the remaining members; it does not operate as a notice to one with whom the firm had business relations prior to the publication; as to them, actual notice is necessary.

It seems this rule does not apply to a dormant partner, that is, one who took no part in the business and whose connection with it was unknown.

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The defendants entered into an agreement, by the terms of which they formed a copartnership under the name of B. & Co., for the purpose of carrying on a business specified. It was agreed that defendant H. should not give his attention to the business, but that he "shall be consulted in the business, and all the plans and operations of the firm shall be made and done with the advice of the firm." The other defendants were to give their whole time and attention to the business. Under this agreement the business was carried on; H. was engaged in other business, but he took part, to some extent, in its financial management and in correspondence with creditors, writing letters in his own name and in that of the firm, and his copartners informed persons dealing with the firm that he was a partner. In an action brought upon an alleged firm indebtedness, H. defended on the ground that before the indebtedness was incurred, he retired from the firm. It appeared that notice of the dissolution was published in a local paper, but that the business was continued in the same firm name. Plaintiff had dealt with the firm before the withdrawal of H., and had no notice of his withdrawal; it had no knowledge in fact that he had ever been a partner; H. also testified that at the time of the formation of the partnership, it was said that it should not be made public and evidence was given on his behalf to the effect that it was not generally understood that he was a partner. *Held* (HAIGHT, J., dissenting), that H. was liable; that under the partnership agreement, he was not a dormant but an active partner; and that a submission of that question to the jury was error; also that the liability of H. was not changed by the fact that plaintiff did not know he was a partner.

(Argued December 2, 1890; decided January 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 30, 1887, which affirmed a judgment in favor of the defendant, Nathaniel C. Harris, entered upon a verdict and affirmed an order denying a motion for a new trial.

The action is brought to recover upon liabilities of the firm of Blood & Co., originally composed of the defendants.

The defendant Harris alone defends, and upon the ground that several years prior to the transactions upon which this action is founded he had withdrawn from the firm.

It appears that the plaintiff had had dealings with Blood & Co. prior to Harris' withdrawal, and that notice of such withdrawal was not given to the plaintiff. But the defendant insists

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that he was a dormant partner and, therefore, not bound to give notice of his retirement from the firm to those with whom the firm had dealt prior thereto, in order to relieve himself from liability for an indebtedness subsequently incurred by those who continued to carry on the business under the same firm name. On the 1st day of January, 1862, John P. Blood, Samuel N. Blood and the defendant, Nathaniel C. Harris, entered into an agreement in writing, the material parts of which are as follows: "The said parties have this day entered into a copartnership, and by these presents do agree to become copartners in the foundry, machine shop business, and in all things thereto belonging; and also in buying and selling, building and retailing all sorts of ware, goods and commodities belonging to the foundry and machine shop business, and in the manufactory of all implements of husbandry, and, in general, all business which has heretofore been carried on by the said Blood, and to continue for the term of ten years from the date hereof, if the said parties shall agree in their business. * * * And it is further agreed and understood by and between the parties that the said John P. Blood and Samuel N. Blood are to give their entire personal attention to the management of the business, which is to be located and carried on in the boro' of Athens, at such place as shall be agreed upon by the parties, and said John P. Blood and S. N. Blood shall have six hundred dollars each year for their services in managing the business as aforesaid, to be drawn from the company's fund, and neither partner shall have the right to draw any further sum without the written consent of the other parties.

"The said J. P. and S. N. Blood agree to give their whole time to the business and to keep an accurate book or books, with entries of all matters of business belonging to the firm, which shall be accessible to both the parties at all times and for all purposes. * * * And said N. C. Harris shall be consulted in the business; and all the plans and operations of the firm shall be made and done with the advice of the firm; and the said N. C. Harris to have and receive from the firm one hundred dollars per year for his services for the care and

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assistance which he may render to the firm without giving his personal attention to the business."

Thereafter and until about October 25, 1869, pursuant to such agreement, the parties thereto conducted business under the firm name of Blood & Co. On the day last named, Harris withdrew from the firm and a notice of the dissolution was published in one issue of a local paper, but such publication did not come to the knowledge of the plaintiff, and notice thereof was not given nor attempted to be given to the plaintiff otherwise than by such publication. Thereafter the Bloods, together with G. M. Angier, under the same firm name, continued the business without interruption until March 21, 1876, when they made a general assignment for the benefit of their creditors. Angier worked in the manufactory as a shop-hand from the formation of the firm in 1862 down to the date of the general assignment, and during all this time there was no change either in the firm name, signs, or general aspect of affairs. Whilst Harris was a member of the firm he was engaged in other business and took no part in the making of purchases or sales for the firm. He paid some attention to the financial part of the business, and had some correspondence with creditors of the firm, both in the name of the firm and his own. He testified that at the time he entered into the partnership, it was said that it should not be made public — "shouldn't be talked about at all," and evidence was introduced in his behalf tending to show that it was not generally understood that he was. John P. Blood testified that it was known by quite a number that Mr. Harris was a member of the firm, and that all persons dealing with the firm who asked him were told that Mr. Harris was a member; that he could not tell how many he told; that they told the parties interested in the concern to know who the partners were, and that it was customary for the firm to tell who were the members of the firm to those dealing with it, if they asked. Samuel N. Blood testified that the connection of Harris with the firm was not kept secret by him at all, and that he talked of it generally whenever the question came up. It appears that the plaintiff

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did not know until after its dealings with the firm of Blood & Co. were at an end, that Harris was a member of the firm. The plaintiff's president testified that no inquiry was made as "to who constituted the firm of Blood & Co. * * * We thought the credit of Blood & Co., when we first commenced dealing with them, was good; we inquired and ascertained that the credit of the firm was good." The court submitted to the jury the question whether Harris was an ostensible or dormant partner, with instructions that if they should find under the evidence that he was a dormant partner, then the defendant was entitled to a verdict; otherwise that the plaintiff was entitled to recover.

Other facts appear in the opinion.

Frederick Collin for appellant. To relieve a retiring partner from subsequent transactions in the partnership name, with a person who has dealt with the firm before the dissolution, notice of the dissolution must be brought home to the person. (*Austin v. Holland*, 69 N. Y. 571; *Howell v. Adams*, 68 id. 314; *Kenny v. Altwater*, 77 Penn. St. 34; *Elkinton v. Booth*, 143 Mass. 479; *Clark v. Fletcher*, 96 Penn. St. 416; *Kelley v. Hurlburt*, 5 Cow. 534.) Under the agreement of January 1, 1862, and the firm name of Blood & Co., in completion of said agreement Harris became, as a matter of law, an ostensible partner with John P. Blood and Samuel N. Blood. (*Sweet v. Morrison*, 103 N. Y. 235; *Pringle v. Leverich*, 97 id. 180; *U. N. Bank v. Underhill*, 102 id. 336; *F. & M. Bank v. B. & D. Bank*, 16 id. 125; *Lindley on Part.* 237; *Baldwin v. Burrows*, 47 N. Y. 199; *C. C. S. Bank v. Walker*, 66 id. 424; *Belton v. Hatch*, 109 id. 593; *Wild v. Davenport*, 48 N. J. L. 129; *Cassidy v. Hall*, 97 N. Y. 159-171; *Thompson v. N. Bank*, 111 U. S. 529; *Dennethone v. Hook*, 112 Penn. St. 240; *Curry v. Fowler*, 87 N. Y. 33; *F. N. Bank v. Tarbox*, 38 Hun, 37; *Metcalf v. Williams*, 104 U. S. 93; *Wright v. Cabot*, 89 N. Y. 570; *Mullen v. Lamphear*, 15 N. Y. S. R. 647; *Kayton v. Barnett*, 10 id. 444; *Bliss v. Bliss*, 7 Bosw. 339; *McLachlin v. Brett*, 34 Hun, 478; 105 N. Y.

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391; *Southwell v. Bowditch*, L. R. [1 C. P. Div.] 100, 374; *Deering v. Flanders*, 49 N. H. 225; *Elkinton v. Booth*, 143 Mass. 479; *Davison v. Holden*, 55 Conn. 112; *Clark v. Fletcher*, 96 Penn. St. 416; *Winship v. Bank of U. S.*, 5 Pet. 529; *Mitchell v. Dall*, 2 Harr. & Gill, 171; *Tier v. Lampson*, 35 Vt. 179; *B. C. Bank v. Howard*, 35 N. Y. 500; *Benjamin v. Covert*, 47 Wis. 375; *Beecher v. Bush*, 45 Mich. 188; *A. L. T. Co. v. Wortendyke*, 24 N. Y. 550; *Cammack v. Johnson*, 2 N. J. Eq. 163; *Van Valen v. Russell*, 13 Barb. 591; *Bulger v. Rosa*, 119 N. Y. 459; *Platt v. Halen*, 23 Wend. 456; *Cookingham v. Lasher*, 2 Keyes, 454; *North v. Bloss*, 30 N. Y. 374; *Howe v. Savory*, 49 Barb. 403; *Van Eps v. Dillage*, 6 id. 244; *Wordwell v. Haight*, 2 id. 549.) The court should, upon the undisputed facts and evidence, have held as a matter of law that Harris was an ostensible partner, and directed the verdict for plaintiff. (*Deering v. Flanders*, 49 N. H. 225.)

J. A. Gibson for respondent. The trial court should have nonsuited the plaintiff. (*Davis v. Allen*, 3 N. Y. 163; *Howell v. Adams*, 68 id. 314.) There is no valid exception to the evidence. (*Brown v. Thurber*, 77 N. Y. 613; *Sprague v. Hosmer*, 82 id. 467; *Van Brunt v. Day*, 81 id. 251; *Lewis v. Seabery*, 74 id. 410; *Chapin v. Dobson*, 78 id. 74; *Lattimer v. Hill*, 8 Hun, 172.) There is no valid exception to the charge of the court. (*Read v. Nichols*, 118 N. Y. 224; *Smedis v. B., etc., R. R. Co.*, 88 id. 13; *McGinley v. U. S. L. I. Co.*, 77 id. 495; *Langley v. Wadsworth*, 99 id. 61; *Newall v. Bartlet*, 114 id. 399.) Assuming that there was sufficient evidence to go to the jury upon the question, notwithstanding that the plaintiff consented that the court pass upon the question; it is well-settled law that where the plaintiff makes the motion for a directed verdict, and the defendant makes a motion for a nonsuit, that there is a submission to the court of every question which is not thereafter specifically asked to be sent to the jury. (*Kirtz v. Peck*, 113 N. Y. 222; *Provost v. McEncroe*, 102

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N. Y. 650; *Mayer v. Dean*, 115 id. 556.) The question of activity is not an element of dormant partnership except as it bears upon the question whether the partner is generally known to be a partner. (3 Pars. on Part. 411, 415; *Davis v. Allen*, 3 N. Y. 172; Story on Part. 247, § 160; *Chamberlain v. Dow*, 10 Mich. 319; *Thompson v. F. N. Bank*, 111 U. S. 529; *Cassidy v. Hall*, 97 N. Y. 160; *Morehouse v. Yeager*, 71 id. 594.)

PARKER, J. The question to be determined is presented by an exception taken to the refusal of the court to direct a verdict in favor of the plaintiff.

The plaintiff insisted that it was the duty of the court to determine as a matter of law that the defendant while a member of the firm of Blood & Co. was an ostensible partner. The trial court held otherwise and submitted to the jury the question whether Harris was an ostensible or dormant partner with the further instruction that if they should find that he was a dormant partner then the defendant was entitled to a verdict.

Now, it is the general rule that a partner can only relieve himself from liability for subsequent transactions had with his former partners, in the partnership name, by giving notice of his withdrawal. (*Austin v. Holland*, 69 N. Y. 571; *Howell v. Adams*, 68 id. 314; *Elkinton v. Booth*, 143 Mass. 479.)

The rule is founded upon the principle governing the liability of a principal for the acts of his agent, where an agent has once represented his principal, if the principal would avoid responsibility for his acts in the direction of his original authority after the agency has ceased, it is incumbent upon him to notify those with whom he has dealt that such relation no longer continues. And a partner in dealing with third parties in behalf of the partnership not only acts for himself but as agent for each of the other members of the firm. So that when a partner withdraws from a firm it is his duty to give notice of that fact in order that it may be understood that his former partners have no longer any right to represent him. And if he fail to discharge that obligation he cannot

thereafter avoid liability for an indebtedness incurred in the partnership name to a party unaware of the changed situation.

It appears that a notice of dissolution was, at the time, published in a local paper, but that could only affect those who should deal with the firm for the first time, after the withdrawal. It did not operate as a notice to the plaintiff with whom the firm had had business relations prior thereto. As to it, actual notice could alone suffice. It was not given, and, therefore, defendant is chargeable with the indebtedness sought to be recovered, unless he is entitled to the protection of the one exception to the rule, continuing the liability of partners after dissolution, who fail to give notice. A dormant partner need not give notice, and the jury have been permitted to find that such was Harris' relation to the firm of Blood & Co. Whether rightly, we must now consider. The first step in that direction is to ascertain what is meant by the term "dormant partner." Bouvier defines "dormant" as sleeping, silent, not known, not acting. "A dormant partner" (says Collier in his work on Partnership [6 ed.], p. 11) "is he whose name and transactions as a partner are professedly concealed from the world * * * is one who shares in the profits of a business, but is not known as a member of the firm."

A dormant partner is one "taking no part in the management of the partnership." (Lindley on Part. 16.)

"We think, however, the word implies both the quality of secrecy and inactivity." (Pars. on Part. § 3.)

In *National Bank v. Thomas* (47 N. Y. 15, 19) the court said: "A dormant partner is one who takes no part in the business, and whose connection with the business is unknown. Both secrecy and inactivity are implied by the word." As the court cited *North v. Bloss* (30 N. Y. 374), as well as other authorities in support of the definition given, it is clear that it did not understand or intend that the *North* case should have the effect of altering a rule which had been long settled as asserted by it. It follows that one occupying such a relation to a partnership need not give notice, because his connection with the firm not having been known, it cannot have con-

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tributed in any degree towards establishing the credit of the firm, and, consequently, his withdrawal could not take away a single element which helped to build up the business reputation and credit of the partnership. Such we deem the rule, and it should not be extended. Credit is a matter of such importance in the mercantile world, and the financial standing of any partner may, through various sources, be so readily commingled with that of his firm that it is essential that he should be required to take the precaution of giving notice of withdrawal unless it clearly appears that his connection with the firm did not add to its reputation for responsibility.

It is not attempted here to establish a partnership liability against Harris on the ground of estoppel, which would have burdened the plaintiff with the necessity of establishing that he held himself, or knowingly permitted another to hold him out as a partner; that the plaintiff had knowledge of such holding out, and was induced thereby to create the debt. And the authorities applicable to such a situation, of which *Thompson v. First National Bank of Toledo* (111 U. S. 529) is a type, need not be considered.

The written agreement entered into between the Bloods and Harris made the parties actual partners. It neither limited the liabilities or the agency of either. It did not suggest that Harris' connection with the firm should be kept secret. It did not provide that Harris should, as to its business, be wholly inactive. It required each of the Bloods to give his entire time and attention to the business, for which each was to be paid \$600 per annum. While as to Harris, who was engaged in other business, it was agreed that he should "be consulted in the business, and all plans and operations of the firm shall be made and done with the advice of the firm; and the said N. C. Harris is to have and receive from the firm \$100 per year for his services for the care and assistance which he may render to the firm without giving his personal attention to the business."

The agreement, therefore, does not indicate that it was the intention of the parties that Harris should be a secret partner,

sharing in the profits as a reward for his contribution to the capital without contributing in any other manner to the standing and business of the firm. Neither was he in fact inactive during the seven years that elapsed before his withdrawal. While he did not engage in the purchase of material or the sale of manufactured articles, he did take part to some extent in the financial management of the partnership, and in the settlement of controversies, in which he wrote letters over his own signature as well as that of the firm. During some portions of the partnership period he was frequently about the shops, at times nearly every day, looking over the work and occasionally speaking to the different foremen about it.

Neither did his partners keep secret the fact of his connection with the firm.

John C. Blood testified: "I presume it was known by quite a number that Mr. Harris was a member of the firm of Blood & Co.; if a person asked me who had a right to know I told them; those who had a right to know were the men dealing with us, and the men who were dealing with us who asked me were told that Mr. Harris was a member of the firm; I couldn't tell you how many I did tell."

Samuel N. Blood testified: "Q. Was his connection with the firm kept secret by you or by anybody else to your knowledge? A. It was not by me at all. Q. Did you tell persons inquiring that he was a member of the firm? A. I did, sir. Q. And talked of it with persons doing business with you generally? A. I did, sir; whenever the question came up."

Again, the adoption of the firm name of Blood & Co. is in opposition to the claim of dormancy on the part of Harris. A dormant partner is one who becomes such by a secret arrangement, while his associates are held out to the world as sole proprietors and managers of the business. (*Beecher v. Bush*, 45 Mich. 188-203.)

If the business had been carried on under the firm name of Blood & Blood or Blood Bros., then the Bloods would have been held out as comprising the entire firm. But the words "& Co." indicate an agency, and that a principal or principals

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are undisclosed, and if credit is given the law presumes that it was given to all the principals.

In *Shamburg v. Ruggles* (83 Pa. St. 148), the court say: "If A. B. & C. enter into articles of association and agree that the business shall be conducted by A. and in his name alone, B. & C. in such case are dormant partners, and though liable for the debts and obligations of the firm during its continuance, are not so liable for debts after its dissolution, although notice of such dissolution may not have been given to the public or those previously dealing with it, for it is to be presumed that credit was given upon the responsibility of A. alone and not upon that of B. & C. If, however, the business be conducted in the name of A. & Co., a different presumption arises, for then it is supposed that credit is given not to A. alone, but to all those composing the company; in other words, to the firm and not to any one individual of it. In such case, if B. & C. retire, notice must be given to those dealing with the firm, or he will continue to be liable for the debts thereof subsequently contracted with former creditors who may be ignorant of the dissolution." To the same effect is the reasoning of the court in *Deford & Co. v. Reynolds* (36 Pa. St. 325); *Podrasnik v. Martin* (25 Ill. App. 300); *Deering v. Flanders* (49 N. H. 225); *Clark v. Fletcher* (96 Pa. St. 416).

Notwithstanding the terms of the agreement of partnership, the adoption of a firm name which did not exclude the defendant, the announcement by each of the Bloods to those making inquiries and having dealings with the firm that Harris was one of the partners, and the further fact that he, to some extent, participated in the settlement of accounts and the financial management of the business — facts, which standing alone determine that Harris' status in the firm was that of an ostensible partner — it is insisted that other evidence presented, on the part of the defendant, authorized a submission to the jury of the question whether he was a dormant partner.

The evidence relied on, in support of such position, was: 1. That it was said at the time of the formation of the partnership that it should not be made public — "should not be talked

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about at all." 2. The testimony of a number of witnesses residing in that locality, some of whom had had dealings with the firm of Blood & Co., to the effect that they did not know that Harris was a partner.

This evidence, it is asserted, tended to show that his relation to the firm of Blood & Co. was not generally known. It may be observed, in passing, that one of the Bloods denied that there was any understanding, at the time of the formation of the partnership, that the fact of Harris' membership should not be talked about, and evidence was adduced, on the part of the plaintiff, for the purpose of showing that it was quite generally known in the community that Harris was a member of the firm.

For the purpose of this review, however, the plaintiff's answering evidence cannot be considered, as we are to determine whether the defendant's evidence was of such a character as to authorize a jury to find that he was a dormant partner, notwithstanding the facts which, if standing alone, we have asserted require a holding that he was in law an ostensible partner.

The agreement of partnership was reduced to writing. It does not in any manner suggest that the membership of Harris was to be kept from the public. It purports to embrace the entire agreement, and the defendant has not attempted to show that in reducing the agreement of the parties to writing anything was omitted by mistake or otherwise which had been agreed upon. It is not asserted that this so-called understanding was made a part of the original contract. It is not pretended that the parties made a subsequent agreement founded upon a new consideration. It does not clearly appear that the matter was spoken of in the presence of all the parties, much less assented to, for Samuel N. Blood says he does not remember any such thing, and was not a party to any such agreement, and Harris' evidence does not necessarily include him. Harris' testimony on the subject, and the whole of it, is comprised in an answer to a single question.

"Q. Now you may tell me, at the time you entered into

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this partnership, was there anything said between you as to whether this should be made public? A. There was, sir; it was not to be talked about at all." It is, we think, clear that this evidence cannot be permitted to effect a change in the legal relation which the parties assumed in writing and by subsequent conduct.

Neither can a general partner, who, in order to relieve himself from a liability which attaches to an ostensible partner, assumes the burden of proving that he was a dormant partner, be deemed to have so well borne it as to destroy the legal effect of acts of the character disclosed by this record, by the testimony of his neighbors and others given years after the dissolution, to the effect that they did not know until after the happening of that event that he was ever a member of the firm, supplemented by the expression of his own opinion that not one in ten in his vicinity knew of it. The question is not whether one knew it or nearly all, but whether by agreement—the adoption of a firm name—and subsequent conduct he so held out the Bloods as the only members of the partnership as to prevent his name from contributing to the standing and credit of the firm. If he did not, then he must be visited with the legal consequences of his failure to give notice to those who had, prior to his withdrawal, transacted business with the firm, and the lack of information on the part of some or many persons will not operate to shield him from it.

The plaintiff, it seems, did not know that Harris was a member of the firm, but that fact cannot avail the defendant, because at the time of the commencement of the dealings with the plaintiff he was "an ostensible and not a secret partner, and was such as to all persons dealing with the firm, and his liability to the plaintiff is not changed by the fact that the plaintiff did not know that he was a partner. He trusted the copartnership, whoever the partners might be, who composed it." (*Howell v. Adams*, 68 N. Y. 314.)

This position is not only supported by authority, but is well founded in the methods largely adopted in business circles for the purpose of ascertaining whether credit shall be given.

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The competition in business and rapidity with which orders must be filled make it necessary for business houses to promptly ascertain whether credit shall be given. This necessity has contributed to the establishment of agencies which undertake to ascertain the financial condition of corporations, firms and individuals engaged in business.

The inquiry addressed naturally is, what is the financial condition of Jones & Co.? For, having no acquaintance with the individuals comprising the firm, information as to membership does not aid the inquirer. So in this case, the plaintiff's president testified that no inquiry was made as "to who constituted the firm of Blood & Co. * * * We thought the credit of Blood & Co., when we first commenced dealing with them, was good; we inquired and ascertained that the credit of the firm was good."

The judgment should be reversed.

HAIGHT, J. (dissenting). This action was brought to recover upon a liability of the firm of Blood & Co., in which it is sought to charge the defendant Harris as a member of the firm.

The facts are undisputed that from the 1st day of January, 1862, until the 25th day of October, 1869, the defendant was a member of the firm of Blood & Co.; that on the 25th day of October, 1869, the firm was dissolved by the withdrawal of the defendant Harris therefrom, and a new firm organized under the same name, in which one G. M. Angier took Harris' place. The new firm continued business until the 21st day of March, 1876, at which time it made a general assignment for the benefit of creditors. The plaintiff first transacted business with the firm of Blood & Co. in the year 1869, prior to the withdrawal of Harris, and from time to time thereafter it sold the firm material until near the time of the general assignment made as aforesaid; that the liability upon which this action was brought was incurred shortly before the assignment, nearly seven years after Harris had ceased to have any connection with the firm. It further appears that the plaintiff or its

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officers did not know that Harris was ever connected with the firm until after the liability upon which this action was brought was contracted and the general assignment was made. It is sought, however, to hold him liable for the reason that no notice was given to the plaintiff or its officers of his retirement from the firm in 1869.

The trial court held that if Harris' connection with the firm was open and notorious as an ostensible partner, he would be liable; but if his position was not open and notorious as an ostensible partner, but was that of a dormant partner, he would not be liable, and this question was submitted to the jury who found in favor of Harris, and the judgment entered upon this verdict has been affirmed by the General Term.

It has been repeatedly held in this court that questions involving the weight of evidence cannot be here reviewed; that they are finally disposed of by the General Term; that this court can only inquire as to whether there is evidence upon which the verdict could stand. The claim is made that there is no such evidence.

A dormant partner has been variously defined as sleeping, silent, not known, not acting, one whose name and transactions as a partner are professedly concealed from the world, one who shares in the profits of a business but is not known as a member of the firm. In its strictest sense it may imply both the quality of secrecy and inactivity, but it has been held that to be such it is not essential that the dormant partner should wholly abstain from any actual participation in the business of the firm or be universally unknown as bearing a connection with it. He may act in an advisory manner in the general business of the firm and it is sufficient if he is not generally known as a partner. (*North v. Bloss*, 30 N. Y. 374.)

With this understanding as to the meaning of the term "dormant," we proceed to inquire as to whether there is any evidence tending to show whether Harris was such, which required a submission of that question to the jury. Our attention is first called to the articles of copartnership in which we find it provided that it is "Agreed and understood by and between

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the parties that the said John P. and Samuel N. Blood are to give their entire personal attention to the management of the business which is to be located and carried on in the boro. of Athens at such place as shall be agreed upon by the parties, and said John P. Blood and S. N. Blood shall have six hundred dollars each year for their services in managing the business as aforesaid, to be drawn from the company's fund, and neither party shall have the right to draw any further sum without the written consent of the other parties. The said J. P. and S. N. Blood agree to give their whole time to the business and keep an accurate book or books, with entries of all matters of business belonging to the firm, which shall be accessible to both parties at all times and for all purposes. * * * And the said N. C. Harris shall be consulted in the business, and all plans and operations of the firm shall be made and done with the advice of the firm, and the said N. C. Harris is to have and receive from the firm one hundred dollars per year for his services for the care and assistance which he may render to the firm without giving his personal attention to the business."

It thus appears from the express provisions of the instrument that the two Bloods are to carry on the business of the firm and keep its books; that the defendant Harris is not to give his personal attention to the business, but is to be consulted. His position in the firm, therefore, is that of a counselor or adviser, and this is one of the things that he may do and not become an active partner.

It is said, however, that the defendant Harris often visited the work-shops of the firm, looked over the buildings and the work that was being done by the employes; that he wrote two letters to individuals in reference to the affairs of the firm, in one of which he signed his own name, and in the other that of the company. There is nothing, however, in the contents of the first, subscribed by him individually, which indicates that it pertains to any of the affairs of the firm. The other, however, has attached a bill of the firm for a balance of an account rendered, to which attention is called in the letter, and

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the statement is made that the same can be settled by the payment of one-half down and by giving a note for the balance. Harris testified that he took no active part in the business of the firm; that he was engaged with one Clark in the manufacture of mowing machines, and that they employed the firm of Blood & Co. to manufacture quite a large number of those machines. If this be so, he could properly look after the construction of the machines from time to time as a member of the firm of Harris & Clark, and still not interfere with his character as an inactive partner of the firm of Blood & Co. Whilst the writing of the letter on behalf of the firm may be a circumstance for the jury, this act standing alone would not, as a matter of law, constitute him an active partner.

It is urged that the contract does not provide that Harris should, as to the business of the firm, be wholly inactive. Very true, no such expression appears in the articles of agreement. It does, however, state what his duties shall be, that of advising, etc., but, as I have already shown, it is not necessary that he should be wholly inactive or that he should wholly abstain from any actual participation in the business.

It consequently appears to me that taking the evidence in connection with the articles of copartnership, a question was presented in which the jury might find that his position in the firm was that of an inactive partner.

It still remains to be determined as to whether his connection with the firm was kept secret to such an extent as not to be generally known. Upon this question Harris testified that at the time they entered into the copartnership it was talked between them that it should not be made public; that it was not to be talked about at all; that that was the understanding when he went into the firm; that he did not know that anything had been said in reference to his connection with the firm in the community in which they did business.

John P. Blood testified that at the time Harris became a member of the firm it was said that he should not be generally known as a partner. On his cross-examination he said he presumed it was known by quite a number that Mr. Harris was a

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member of the firm ; that if a person asked him who had a right to know, he told him, etc. He does not, however, state that anyone did ask him, or that he, in fact, told anyone.

Evidence was also given on behalf of the defendant by a number of individuals living at the place in which the firm's business was conducted, to the effect that they had business transactions with the firm during its existence and that they never knew or understood that Harris was a member of the firm until the notice of dissolution was published. It is true that the evidence in reference to the talk about the arrangement to keep Harris' connection with the firm secret is controverted by the testimony of S. N. Blood, and that various witnesses testified that Harris was reputed to be a member of the firm. But this only raised a conflict in the evidence, which it was necessary to have settled by the jury. If it was talked and understood that his connection with the firm was not to be talked at all, as testified to by Harris and John C. Blood, and if the testimony of the witnesses who lived in the immediate vicinity is to be believed, to the effect that they had done business with the firm during its existence, and had not heard or known of Harris' connection with it, the jury was justified in finding that Harris' connection with the firm was that of a dormant partner.

But it is said that nothing was said about keeping Harris' connection with the firm secret in the articles of copartnership, and that this evidence was incompetent and should not have been admitted, for the reason that it tends to vary a written instrument ; that the contract purports to embrace the entire agreement between the parties. It is true that nothing is said in the articles of copartnership in reference to keeping secret the relation of Harris, but I do not understand that it purports to embrace the entire agreement. If it does, may I inquire how much capital was put in by the Bloods, or either of them, or by the defendant Harris, and in what proportion were they to share in the profits or be liable in case of losses ? These are quite important subjects in copartnership agreements, and yet in carefully scanning the agreement, it appears to be silent

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upon those subjects. At the end thereof it states that "this partnership is made up and based upon all the stocks, tools, patterns, horses, wagons, goods manufactured and in process of being manufactured as per invoice, with the parties' names attached." But no such invoice is attached to the exhibit, and I consequently am unable to determine as to its contents, and yet reference is made to it as an instrument upon which the agreement is based. So that, instead of purporting to embrace the entire agreement, it expressly purports to be based upon another instrument which does not appear in the case.

But again, the question of secrecy is not one which would ordinarily be entered in a written contract. A contract between copartners usually regulates the rights and liabilities of the members of the firm, and it is not usual or customary for it to regulate the rights of strangers, or parties with whom the firm may transact business. Whether or not Harris' connection with the firm was made public or kept secret, did not affect or change the rights and liabilities of the copartners. As between the members of the firm, their rights and liabilities were the same whether his connection was public and notorious, or secret and unknown. Persons transacting business with the firm alone would be affected. The evidence was competent, and it is in entire harmony with the written contract.

But I am of the opinion that the defendant's motion for a nonsuit might have been properly granted. My examination of the case fails to disclose any evidence showing that the relation of Harris with the firm was that of an open, notorious, ostensible partner, or that he was generally understood as such. His name does not appear in that under which the firm did its business. He was not to be active under the provisions of the agreement, and even conceding the testimony of the witnesses to be true, who had heard rumors and reports in reference to his being a member, it falls short of giving him the general reputation as an acting, ostensible member, which, under the circumstances of this case, would render him liable. If a dormant partner, it is conceded he would not be liable by reason of the failure to give notice of the dissolution of the partner-

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ship, and the reason of the rule is that the plaintiff suffers nothing in consequence of such failure. If the plaintiff had no notice of Harris' connection with the firm at the time it transacted its business, it could have given no credit on his account.

This rule is salutary and is founded upon reason. The plaintiff has no right to exact a penalty from Harris by reason of his failure to give notice. The word "dormant," when used in this connection, should be held to cover cases that clearly come within the reason of the rule. The plaintiff, in order to recover, must show that it has suffered in consequence of his neglect. It is frankly admitted that the president or officers of the plaintiff did not know that Harris was a member of the firm at any time until after the final credit was given, and the general assignment of Blood & Co. was made.

It, therefore, gave no credit to the firm on account of Harris, and it suffered nothing by his failure to give notice of his retirement, unless his relation with the firm was so notorious and ostensible as to give it a financial standing and reputation with the public. There is no pretence that his relation was of this character, or that any credit was given by the plaintiff because of any such reputation. It would rather appear that the credit was given on account of the Bloods, for, in the examination made by the plaintiff before giving credit, it is stated that they discovered that the real estate upon which the buildings were constructed belonged to the Bloods.

In the case of *Davis v. Allen* (3 N. Y. 168-172) the action was brought against three persons as partners who did business under the name of the Albany and Buffalo Towing Company. The action was for work and labor done and performed. The defense of the defendant Childs was that the demand accrued against the company subsequent to his ceasing to be a member of the firm. His name did not appear in the name under which the company did its business. It was claimed, however, that he was liable for the reason that the plaintiff had worked for the company during the years that he was a member, and that no notice had ever been given of his retire-

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ment from the firm. JEWETT, Ch. J., in delivering the opinion of the court, states the general rule, and then concludes as follows: "In order to render him liable on this ground it is necessary that he should have been known as a member of the firm to the plaintiff, either by direct transactions or public notoriety."

In the case of *Thompson v. First National Bank of Toledo* (111 U. S. 529) the court at Circuit was requested to instruct the jury that if Thompson was not in fact a member of the partnership the plaintiff could not recover against him unless it appeared from the testimony that he had knowingly permitted himself to be held out as a partner, and that the plaintiff had knowledge thereof, during its transactions with the partnership. The court charged all except the last proposition, which it refused. On review it was held that the Circuit Court erred, holding that the plaintiff could not recover unless he had knowledge that the defendant held himself out as a member of the firm during the time that the plaintiff had transactions with the partnership.

Whilst this case differs from the one under consideration, the principle involved is the same. GRAY, J., in delivering the opinion of the court, says: "A person who is not in fact a partner, who has no interest in the business of the partnership and does not share in its profits, and is sought to be charged for its debts because of having held himself out, or permitted himself to be held out as a partner, cannot be made liable upon contracts of the partnership, except with those who have contracted with the partnership upon the faith of such holding out. In such a case the only ground of charging him as a partner is, that by his conduct in holding himself out as a partner he has induced persons dealing with the partnership to believe him to be a partner, and, by reason of such belief, to give credit to the partnership. As his liability rests solely upon the ground that he cannot be permitted to deny a participation which, though not existing in fact, he has asserted or permitted to appear to exist, there is no reason why a creditor of the partnership, who has neither known of nor acted upon

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the assertion or permission, should hold as a partner one who never was in fact and whom he never understood or supposed to be a partner at the time of dealing with and giving credit to the partnership." In further discussing the question the learned justice, in his opinion, calls attention to the exception, and says that "there may be cases in which the holding out has been so public and so long continued that the jury may infer that one dealing with the partnership knew it and relied upon it without direct testimony to that effect," in which case the party would be liable.

Collyer, in his work on Partnership, in section 536, says: "Even where a person has retired from a firm, who, though intentionally a dormant partner, was known to many as a member of the firm, he will not, by failing to give notice of his retirement, become liable to the creditors of the remaining partners if such creditors, at the time of their respective contracts, were ignorant of his being a partner." (See also Story on Partnership, §§ 159, 160; 1 Lindley's Law of Partnership, 410; *North v. Bloss*, *supra*.)

I do not understand the case of *Howell v. Thomas* (68 N. Y. 314) to be in conflict. In that case the defendant had been a member of the banking firm, and had filed a certificate with the superintendent of the banking department under the provisions of the act to authorize the business of banking, and the acts amendatory thereto. He was, by this certificate, made a notorious, active, ostensible partner, upon which, as a banking firm, a financial credit was given. The business was conducted under the name of the Suffolk County Bank. The plaintiff did not know who composed the firm at the time of making his deposit. It was, however, held that the defendant was liable, even though notice of his prior withdrawal had been given. Attention is called to this distinction in the opinion of GRAY, J., in the case of *Thompson v. First National Bank of Toledo* (*supra*), and also by JEWETT, Ch. J., in the case of *Davis v. Allen* (*supra*).

I cannot believe that there is anything in the name of "Blood & Co." that makes the defendant Harris liable. There

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were two members by the name of Blood, and one could properly be known as the company.

I am, therefore, of the opinion that the judgment should be affirmed, with costs.

All concur with PARKER, J., except HAIGHT, J., dissenting, and FOLLETT, Ch. J., not sitting.

Judgment reversed.

124	802
151	65

THE NATIONAL TUBE WORKS COMPANY, Respondent, v.
WILLIAM J. GILFILLAN, Appellant.

To establish a cause of action under the provision of the General Manufacturing Act (§ 10, chap. 40, Laws of 1848), making the stockholders of a company organized under it individually liable to the creditors of the company, to the amount of their stock, for all its debts, until the whole amount of the capital stock has been paid in, all that is required is to show that a valid debt was contracted before the capital stock was paid in, either in cash or in property honestly regarded as a fair equivalent to cash.

The liability covers "all debts and contracts made by said company," irrespective of the circumstances under which they were made. There is no exemption from liability, because credit was imprudently given by the creditor, or because he gave credit upon the supposition that the property of the corporation was sufficient to pay its debts.

By proof that the stock of the company has been issued as full-paid stock which has not been fully paid, a legal fraud is established; it is not necessary to show otherwise an actual fraudulent intent.

So, also, if it be shown that the stock was issued in payment for property, with knowledge on the part of its trustees that the value of the property was much less than the amount of the stock, no other fraudulent intent than that which is evidenced by the action of the trustees need be shown to authorize a recovery.

Reported below, 46 Hun, 248.

(Argued December 16, 1890; decided January 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 9, 1887, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

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Action by a judgment creditor of the Brooklyn Marine Power Company, a corporation organized under chapter 40 of the Laws of 1848, against the defendant as a stockholder of said company, to recover a debt pursuant to section 10 of said act, upon the ground that the capital stock had not been paid either in cash or in property fairly worth the par value of the stock issued.

While the answer put at issue all the allegations of the complaint, which was in the usual form in such actions, upon the trial there was no question as to the right of the plaintiff to maintain the action, provided there had been a violation of said section.

Further facts are stated in the opinion.

Charles H. Luscomb for appellant. The court erred in charging that it is not necessary for plaintiff to prove that the trustees of the Brooklyn Marine Power Company have been guilty of a fraudulent intent to entitle the plaintiff to recover. (*Douglass v. Ireland*, 73 N. Y. 102; *Dodge v. Havemeyer*, 4 N. Y. S. R. 561; *Schenck v. Andrews*, 57 N. Y. 133.) Evidence of the amount realized at the sheriff's sale was improper. (*Schenck v. Andrews*, 57 N. Y. 150, 151.) Defendant sought to explain the transaction of the distribution of stock after its issue, and the intention of the parties in reserving 200 shares for the benefit of the company. (*Gamble v. Q. C. W. Co.*, 23 N. Y. S. R. 409; *Douglass v. Ireland*, 73 N. Y. 105; *L. S. I. Co. v. Drexel*, 90 id. 93.) The court erred in denying the motion to dismiss. (*Douglass v. Ireland*, 73 N. Y. 104; *L. S. I. Co. v. Drexel*, 90 id. 93; *Schenck v. Andrews*, 57 id. 133; *Dodge v. Havemeyer*, 4 N. Y. S. R. 561.) The denial of the motion to direct a verdict for the defendant and the motion for a new trial was error. (*Chase v. Lord*, 77 N. Y. 6; *Bruce v. Driggs*, 26 How. Pr. 71; *L. S. I. Co. v. Drexel*, 90 N. Y. 93; *Boynnton v. Andrews*, 63 id. 95; *Schenck v. Andrews*, 57 id. 133.)

Alfred Jaretski for respondent. All that it was necessary to prove in order to establish the defendant's liability as a

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stockholder was : (1) That the stock issued exceeded in amount the value of the property in exchange for which it was issued, and (2) that the trustees deliberately and with knowledge of the real value of the property overvalued it and paid in stock for it an amount which they knew was in excess of its actual value. (*Douglass v. Ireland*, 73 N. Y. 103; *Boynton v. Andrews*, 43 id. 95; *Thurston v. Duffy*, 38 Hun, 329; *L. S. I. Co. v. Drexel*, 90 N. Y. 94; *Huntington v. Attrill*, 118 id. 365, 382.) The capital stock of the company was \$300,000. It was issued for the five inventions of Mr. Bliven's, which are described in the trust deed. The question whether these five inventions were worth \$300,000 was eminently a question for the jury. (*L. S. I. Co. v. Drexel*, 90 N. Y. 94.) The trustees of the company, and among them the defendant, deliberately, and with knowledge of the real value of the property, overvalued it, and paid in stock for it an amount which they knew was in excess of its actual value. This was a fraud and a palpable attempt to evade the statute. (*Douglass v. Ireland*, 73 N. Y. 103; *Huntington v. Attrill*, 115 id. 374; *Thurston v. Duffy*, 38 Hun, 329; *Blake v. Griswold*, 103 N. Y. 435.) The entire capital stock of the Brooklyn Marine Power Company had been issued for inventions which had never been patented. (*Gillette v. Bate*, 10 Abb. [N. C.] 88; *Tasker v. Wallace*, 6 Daly, 364.) Mr. Tower and Mr. Bogert were both eminently qualified to testify as to the merits and the commercial value of Mr. Bliven's inventions. (*Blake v. Griswold*, 103 N. Y. 436, 437.) The court had power to submit a special question to the jury for a special verdict. (Code Civ. Pro. § 1187.) One of plaintiff's witnesses was permitted to testify, under defendant's objection, the amount realized at the sheriff's sale of the property of the Brooklyn Marine Power Company. The sale was made under execution issued upon a judgment obtained by the defendant against the company. The testimony was objected to as immaterial. No error was committed in the admission of the testimony. (*Bach v. Levy*, 101 N. Y. 511; *Muller v. Eno*, 14 id. 597.)

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VANN, J. The substantial issue in this action was whether the property procured in exchange for stock was purchased at an over-valuation, not through error of judgment, but in bad faith and to evade the statute. (*Douglass v. Ireland*, 73 N. Y. 100, 104.)

The trial judge instructed the jury that if they found "that the stock issued exceeded in amount the value of the property taken in exchange for it and for which it was issued, and that the trustees deliberately and with knowledge of the real value of the property over-valued it and paid in stock for it an amount which they knew was in excess of its actual value, they must find for the plaintiff. If the jury do not find this to be the fact, then they will find for the defendant."

The jury found a general verdict for the plaintiff, and, as a special verdict, that the property purchased at \$300,000 was really worth but \$75,000.

The evidence in support of the verdict is sufficient if not overwhelming.

The company was organized September 18, 1884, with a capital stock of \$300,000, divided into 600 shares of \$500 each. Within less than a year thereafter, it was hopelessly insolvent, with all its property levied upon under an execution issued on a judgment recovered by the defendant, its president and a trustee from the outset. None of the stock was paid for in cash or otherwise than by the transfer of a lot of unpatented inventions of one Bliven. Two corporations had been previously organized, with the defendant as a trustee in each, to handle these inventions, one of which seems to have been merely a corporation on paper that "had no existence in fact to amount to anything," while the other was "a disastrous speculation."

The inventions were purchased by the corporation, whose transactions are directly involved in this action, substantially in the following manner, viz.: Bliven assigned them to the defendant, who, as trustee, transferred them to the company in consideration of the entire capital stock, to be held by him in trust as follows, to wit: 200 shares for the benefit of the

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company itself; 100 shares, par value \$50,000, for the defendant — (in payment of a debt of \$15,000 owing him by Bliven); 10 shares, par value \$5,000, for one Baxter (in payment of an old debt of Bliven to him of \$2,500); 27 shares apparently given away to qualify persons as trustees and to induce them to act; the remainder to Bliven or for his benefit.

According to the evidence, the jury made a liberal estimate of the real value of the inventions when they found that they were worth \$75,000. The good faith of the trustees, including the defendant, as one of the most active in the transaction of this business, may be inferred from the foregoing facts. If they honestly considered the inventions worth \$300,000, why was one-third of the avails, \$100,000 in stock, donated to the company by Bliven? Why did the defendant accept of \$50,000 in stock in payment of a debt of \$15,000? Why was \$5,000 given to Dexter to pay \$2,500? Why was \$13,500 in stock given to persons to induce them to become trustees? Would \$300,000 in money have been disposed of in this way? The arrangement to thus dispose of the stock was made before the purchase and became a part of it. The facts were all known to the trustees, including the defendant. They were apparently intelligent men, the defendant being a physician. Although they testified that they considered the inventions worth \$300,000 or more, the surrounding circumstances permitted the jury to find, as the General Term said, that they "were not only worth less than the price agreed to be paid for them, but it was so understood by the defendant and the other parties to the transactions." From these and other significant facts, not recited, it is evident that a case was presented for the consideration of the jury, and that the motions to dismiss were properly denied.

The merits are with the plaintiff, and when that is the case the exceptions should be overruled, unless a material and manifest error of law has been committed.

The defendant excepted to the following instruction to the jury made at the request of the plaintiff, viz.: "It is not necessary for plaintiff to prove that the trustees of the Brook-

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lyn Marine Power Company have been guilty of a fraudulent intent to entitle the plaintiff to recover." We do not think that the exception was well taken, because the jury is presumed to comprehend and act upon the charge as a whole, and hence to have understood that the "fraudulent intent" referred to, meant an actual, furtive design to perpetrate a fraud, for they had already been told that "the fraud is consummated by the issue of stock as full-paid stock * * * which has not been fully paid * * * and it does not depend upon any fraudulent intent other than that which is evidenced by the act of knowingly issuing stock for property to an amount in excess of its value. All that is necessary to establish *legal fraud* * * * is proved in two facts," etc., etc. The reference was to actual fraud as contrasted with what was termed legal fraud.

The defendant also excepted to the refusal of the court to charge, at his request, that "if the plaintiff sold the goods to the corporation with full knowledge of what the inventions and improvements owned by the corporation were and relying upon the merits of the inventions, gave the corporation credit, defendant is entitled to judgment." This exception is without merit, because the knowledge of the plaintiff and the facts which induced it to sell its goods on credit were wholly immaterial. Within the limitations of the statute the stockholders are liable for "all debts and contracts made by such company," irrespective of the circumstances under which they were made. (L. 1848, ch. 40, § 10) There is no exemption from liability because credit was imprudently given by the creditor, or because he supposed that the property of the corporation was sufficient to pay its debts. All that the statute requires to make a stockholder liable is that a valid debt shall be contracted under the circumstances therein mentioned and before the capital stock has been paid in, either in cash, or in property honestly regarded as a fair equivalent to cash.

The object of the statute in requiring a certificate to be filed is to inform the public so that they can transact business with the corporation upon the assurance, either that the capital stock has all been paid in, or that the stockholders are severally

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liable for an amount equal to the stock held by them respectively. If, therefore, the plaintiff when it parted with its goods knew the facts as they then existed, it knew no more than the statute contemplates that all persons, who deal with manufacturing corporations, shall know.

We have examined the other exceptions taken in behalf of the defendant, but find nothing that requires a reversal of the judgment, which should, therefore, be affirmed.

All concur.

Judgment affirmed.

SAMUEL TUCKER, as Administrator, etc., Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

The law requires a traveler on a highway, before crossing a railroad track, to look and listen for the approach of trains, and if he omits to do so and suffers injury, he cannot maintain an action against the railroad company, although it was guilty of negligence.

In an action to recover damages for injuries so sustained, the plaintiff must show that he did his duty in this respect, or prove facts from which the inference can reasonably be drawn that he did.

The question at what age an infant's responsibility for negligence may be presumed to commence, is not one of fact, but of law.

In the absence of evidence tending to show that a boy twelve years of age was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track an adult would, he must be deemed *sui juris* and chargeable with the same measure of caution as an adult.

In an action to recover damages for alleged negligence causing the death of T., plaintiff's intestate, the following facts appeared: T. was a boy twelve years old, intelligent, accustomed to attend school and assist the family by his labor; he lived near defendant's road; he was killed by one of defendant's locomotives when attempting to cross its tracks; the day was windy and it was snowing, but not enough to obstruct the view; the street upon which he was traveling was crossed by four of defendant's tracks; the first was a switch track upon which cars were standing on each side of the street, a passage-way having been left open for teams and individuals to pass along the street. T. stopped in the centre of the switch track facing in the direction of the locomotive which was back-

	194	308
	146	300
	124	308
	153	273
	124	308
	160	365
	124	308
	161	324
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ing down at a high rate of speed; if he had looked he could have seen 186 feet down the track; from the point where he stood to the center of the track where he was struck and killed, the distance was fourteen feet. T., after changing a bag he was carrying from one shoulder to another, started on; after taking one step he had an unobstructed view down the track on which the locomotive was coming, for two streets; he did not look in that direction after he started. *Held*, that T. was *sui juris* and was guilty of contributory negligence; and that the submission of the question to the jury was error.

(Argued January 28, 1891; decided February 24, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made November 6, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for alleged negligence causing the death of plaintiff's intestate.

The plaintiff's intestate, a boy of twelve years of age, while crossing Smith street in the city of Buffalo on the 27th day of December, 1885, was run over by defendant's locomotive and killed.

It appears that decedent and his brother were passing south-erly down Smith street, which was crossed between Oneida and Bristol streets by four railroad tracks belonging to the defendant corporation, by three tracks of the West Shore railroad, and two tracks of the Lake Shore and Michigan Southern railroad. They were on the westerly walk of the street, and, after passing over the West Shore tracks, came to a switch track belonging to the defendant. The switch track on each side of Smith street had cars standing upon it, but a passage-way was open on Smith street to enable teams and individuals to cross. The plaintiff's intestate was carrying upon his shoulder a bag partially filled. When he reached the centre of the switch track he changed the bag from one shoulder to the other, resting it on the bumper of the car as he did so. While changing the bag he faced in the direction of the locomotive which was then backing down at a high rate

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of speed. Had he looked he could have seen down the track on which this locomotive was coming a distance of 186 feet. From that point to the center of the track where he was struck and killed was a distance of fourteen feet. To the north rail of the track it was eleven feet, and between the southerly rail of the switch track and such north rail it was eight feet and five inches. After changing the bag he started on, his brother being then about fifty feet ahead of him. After taking one step there was an unobstructed view down the track on which the locomotive was coming for two streets, and before reaching the north rail it was possible to see along it for the distance of nearly a mile. When he had reached about the centre of the track he was struck and killed. The plaintiff introduced evidence tending to show that the flagman in charge of this crossing was not out when the plaintiff's intestate passed, and that the bell was not rung or the whistle of the engine blown until the moment when the accident occurred, but as the question of contributory negligence is alone considered in the opinion further facts as to that branch of the case are not given.

At the close of the evidence defendant's counsel asked the court to direct a verdict for defendant, which was denied.

Further facts appear in the opinion.

James Frazer Gluck for appellant. The plaintiff utterly failed to show that the intestate was free from contributory negligence, and, taking the construction of the evidence most favorable to the plaintiff, it conclusively established that the intestate did not exercise that degree of care which the law requires. (*Cullen v. D. & H. C. Co.*, 113 N. Y. 668; *Reynolds v. N. Y. C. & H. R. R. R. Co.*, 58 id. 252; *McDonald v. L. I. R. R. Co.*, 27 N. Y. S. R. 483; *Wendell v. N. Y. C. & H. R. R. R. Co.*, 91 N. Y. 426; *Beisegal v. N. Y. C. R. R. Co.*, 40 id. 9; *Cordell v. N. Y. C. & H. R. R. R. Co.*, 70 id. 119; *Woodward v. N. Y., L. E. & W. R. Co.*, 106 id. 369; *Young v. N. Y., L. E. & W. R. Co.*, 107 id. 500; *Adolph v. C. P. R. Co.*, 76 id. 553; *Cosgrove v. N. Y. C. &*

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H. R. R. R. Co., 87 id. 91.) The verdict rendered by the jury is contrary to law, and the evidence in the case, because the great preponderance of evidence is, and the jury were bound to find in accord with it, that the plaintiff's intestate was guilty of contributory negligence in approaching the track upon which he was struck. (*Wendell v. N. Y. C. & H. R. R. R. Co.*, 91 N. Y. 428; *Cranston v. N. Y. C. & H. R. R. R. Co.*, 103 id. 614; *Hale v. Smith*, 78 id. 480; *Hunter v. N. Y., O. & W. R. R. Co.*, 116 id. 624.) It was error to refuse to charge the jury that "there is no evidence in the case that the plaintiff's intestate looked; no direct evidence in the case that the boy looked for the approaching train after he crossed the switch track," and the exception to the ruling of the court was well taken. (*Storey v. Brennun*, 15 N. Y. 524.)

Henry W. Hill for respondent. The verdict of the jury, rendered upon the trial, was amply supported by the evidence. (*Hackford v. N. Y. C. R. R. Co.*, 53 N. Y. 654; *Stone v. D. D., E. B. & B. R. R. Co.*, 115 id. 104-112; *D. & M. R. Co. v. Van Steinberg*, 17 Mich. 99; *Parsons v. N. Y. C. & H. R. R. R. Co.*, 113 N. Y. 359-364; *Greany v. L. I. R. R. Co.*, 101 id. 426, 427; *Palmer v. N. Y. & H. R. R. Co.*, 112 id. 242-245; *Wall v. D., L. & W. R. R. Co.*, 54 Hun, 460; *Glushing v. Sharp*, 96 N. Y. 677; *LeGuen v. Gouverneur*, 1 Johns. Cas. 492.) A general verdict settles in favor of the prevailing party every litigated question of fact, and a finding that there was no contributory negligence on the part of plaintiff's intestate must have preceded the finding of a lawful verdict. (*Wolfe v. G. F. Ins. Co.*, 43 Barb. 400; 41 N. Y. 620; Code Civ. Pro. § 1186; *Murray v. N. Y. L. Ins. Co.*, 96 N. Y. 622, 623.) The evidence establishes that George James Tucker exercised all the care and caution that a child just passed twelve years of age would be expected and required to exercise under all the circumstances in which he was placed at the time. (*Greaney v. L. I. R. R. Co.*, 101 N. Y. 426; *Parsons v. N. Y. C. & H. R. R. R. Co.*, 113 id. 364; *Terry v. Jewett*, 78 id. 338; *McGovern v. N. Y. C. & H. R. R. R. Co.*, 67 id. 423;

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Casey v. N. Y. C. & H. R. R. R. Co., 78 id. 521; *Palmer v. N. Y. C. & H. R. R. R. Co.*, 112 id. 241; *Maher v. N. Y. C. & H. R. R. R. Co.*, 67 id. 421; *Stone v. D. D., E. B. & B. R. R. Co.*, 115 id. 111; *Spooner v. D., L. & W. R. R. Co.*, 115 id. 32; *Birkett v. K. I. Co.*, 110 id. 506.) The ordinances of the city of Buffalo, regulating the speed of trains at the Smith street crossing, the *locus in quo* of the accident, were properly admitted in evidence. (*McGrath v. N. Y. C. & H. R. R. R. Co.*, 63 N. Y. 527, 531; *Kupfle v. K. Ice Co.*, 84 id. 491; *Van Raden v. N. Y., N. H. & H. R. R. Co.*, 30 N. Y. S. R. 302; *Archer v. N. Y., N. H. & H. R. R. Co.*, 106 id. 602; *Houghkirk v. D. & H. C. Co.*, 92 id. 227.) The failure to ring the bell, sound the whistle, the absence of the flagman and the running of an engine rapidly backwards through a thickly-settled portion of a city, as well as the locality of the crossing and the condition of the weather at the time, are circumstances to be presented to the jury, with all the other circumstances of the case, as bearing upon the question of negligence. (*Ryan v. N. Y. C. & H. R. R. R. Co.*, 37 Hun, 188; *McGrath v. N. Y. C. & H. R. R. R. Co.*, 63 N. Y. 527-531; *Casey v. N. Y. C. & H. R. R. R. Co.*, 78 id. 521.) The plaintiff fully satisfied the jury by a preponderance of evidence that defendant was negligent in the operation of its engine on the occasion in question, and that such negligence caused the untimely death of plaintiff's intestate, and the verdict of the jury should not be disturbed. (Code Civ. Pro. § 1186; *McGrath v. N. Y. C. & H. R. R. R. Co.*, 63 N. Y. 522; *Massoth v. D. & H. C. Co.*, 64 id. 524; *Spooner v. D., L. & W. R. R. Co.*, 115 id. 22; *Parsons v. N. Y. C. & H. R. R. R. Co.*, 113 id. 359-364; *Casey v. N. Y. C. & H. R. R. R. Co.*, 78 id. 521; *Griffin v. N. Y. C. R. R. Co.*, 40 id. 45; *Finklestein v. N. Y. C. & H. R. R. R. Co.*, 41 Hun, 34.) It cannot be held, as a matter of law, that the verdict rendered in this action is for excessive damages. (*Birkett v. K. I. Co.*, 110 N. Y. 506, 508; *Houghkirk v. D. & H. C. Co.*, 11 Abb. [N. C.] 72; *McGovern v. N. Y. C. & H. R. R. R. Co.*, 67 N. Y. 417; *Oldfield v. N. Y. C. & H. R. R. R. Co.*, 14

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id. 518; *Casey v. N. Y. C. & H. R. R. Co.*, 78 id. 518; *Parsons v. N. Y. C. & H. R. R. Co.*, 113 id. 359; *Spooner v. D., L. & W. R. R. Co.*, 115 id. 22.) It was not error to permit the witness, Miller, to testify as to the fact of defendant's flagman walking lame on the day of the killing of plaintiff's intestate, for the physical condition of the flagman at that time and his unfitness to perform the duties devolving upon him, were competent, as bearing upon the location of flagman at the time, and upon defendant's negligence. (*In re Morgan*, 104 N. Y. 85; *Turner v. City of Newburgh*, 109 id. 308-310; *Marks v. King*, 64 id. 628; *Platner v. Platner*, 78 id. 101; *Holmes v. Moffat*, 120 id. 310; *Mosher v. City of Auburn*, 14 Wkly. Dig. 477; *Pennsylvania Co. v. Roy*, 102 U. S. 451-458.) Plaintiff's intestate, who, when within from eight and one-half to eleven feet of the track over which engine No. 478 was backing, stopped, listened and looked in an easterly direction and seeing neither signal nor approaching engine, had a right to assume that no train nor engine would come along until he could cross the track. (*Parsons v. N. Y. C. & H. R. R. Co.*, 113 N. Y. 364; *Weil v. D. D., E. B. & B. R. R. Co.*, 119 id. 151.)

PARKER, J. Whether the complaint should have been dismissed after the evidence was all in, on the ground that the negligence of the plaintiff's intestate contributed to the accident, presents the only question which we shall discuss on this review.

In its disposition we shall consider first whether, assuming the intestate to have been *sui juris*, the evidence adduced authorized the jury to find that plaintiff's intestate was free from contributory negligence. If not, whether the fact that the intestate was only a little over twelve years of age, considered in connection with the other circumstances proven, could be permitted to effect a different result.

The plaintiff, in order to recover for the damages sustained by the killing of his intestate, which was occasioned by his being run over and killed by a locomotive on the defendant's

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road while crossing its tracks on Smith street in the city of Buffalo, was burdened with the necessity of proving, first, that the defendant was guilty of negligence; and, second, that he was free from all fault contributing to that result.

The law requires a traveler before crossing a railroad track on a public highway to look and listen for the approach of trains. If he omit to do so and suffers injury while crossing, he cannot recover because of such omission. That which it is his duty to do, he or, in the case of death, his representative must, in an action to recover for damages sustained, prove was done or at least must prove facts from which inference can reasonably be drawn that he performed his duty in that respect. It will not be presumed that he looked, it must be proven. The plaintiff attempted to meet this requirement by the evidence of a witness who testified that before the intestate crossed the track, in the doing of which he was struck by the locomotive and killed, he stopped in the centre of the switch track eleven feet from the north rail of the track upon which the locomotive was running and shifted the bag which he was carrying from one shoulder to the other, resting it upon the bumper of a car standing on the track as he did so, and that at this time his face was turned in the direction of the approaching engine. He then passed on in a southerly direction for the distance of about fourteen feet when he was struck. The witness further testified that after changing the bag from one shoulder to the other, he did not again turn his head to the left as it would have been necessary for him to do in order to see the approaching locomotive. It is urged that inasmuch as it appears that his face was turned in the direction from whence the locomotive came, that a jury could be permitted to find that he did look and thus observe that measure of care and caution which the situation imposed. We are unable to agree with that contention, for it appears that from the place where he was standing it was possible to see along the track a distance of 186 feet; that when he reached the south rail of the switch track, a distance of eight feet and five inches from the north rail of the track upon which the locomotive was

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running, he could see for two streets away, and that before reaching such rail the view was unobstructed for nearly a mile. It seems to be clear, therefore, that the plaintiff did not meet the burden resting upon him by merely showing that his face was turned in that direction, for if he had looked he must have seen this engine approaching. But if the inference was permissible that he looked at the moment of changing the bag, it does not meet the requirements of the case. He had still six tracks to cross and was then eleven feet from the south rail of the first track. To look then and not again, to go on from that point without observing the further precaution of watching for the approach of trains upon tracks almost constantly in use, was not a proper observance of that care which it was his duty to exercise. (*Cullen v. D. & H. C. Co.*, 113 N. Y. 668; *Cordell v. N. Y. C. & H. R. R. Co.*, 70 id. 119; *Woodard v. N. Y., L. E. & W. R. R. Co.*, 106 id. 369; *Young v. N. Y., L. E. & W. R. R. Co.*, 107 id. 500.)

And this the plaintiff's intestate did according to the evidence of the witness Martin, who was called by the plaintiff to prove that at the moment of shifting the bag Tucker was facing in the direction of the approaching locomotive. Indeed, it must have been so, for had he looked at any moment before reaching the track, he would have observed its coming.

It appears that the wind was blowing severely and snow was falling rapidly, and it is suggested that by reason thereof he may have been prevented from seeing the approaching locomotive, but the evidence introduced, on the part of the plaintiff, shows that such was not the fact. There were two little girls on the cars at the crossing at the point where the boy stood when shifting the bag from one shoulder to the other, and they saw the locomotive coming. Frank Surrnes was on Smith street near the place of the accident at the time of its occurrence, and he testified that he saw it approaching when it was at Oneida street. The witness Martin also saw it when 350 feet distant. No witness pretends that it could not be seen, and no room exists for the inference that the plaintiff's intestate could not have seen it had he looked.

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We are thus led to the conclusion that there was no evidence authorizing the jury to find that the plaintiff observed that degree of care and caution which the law imposes on one while in the act of crossing railroad tracks on a public street. If he had been an adult, therefore, it would have been the duty of the court to have dismissed the complaint. Does a different rule apply because the intestate was a boy only a little over twelve years of age? An infant of tender years is not expected to exercise the same care and caution which is required of a person of more advanced age, so that it frequently becomes a question for the jury, under proper instructions by the court, whether a child exercised that measure of care and caution which should be required and expected from it.

In the case of *McGovern v. N. Y. C. & H. R. R. R. Co.* (67 N. Y. 417), a boy eight years of age, while crossing a railroad track, was struck by a backing engine and killed. In that case this court held that it was a question for the jury to determine whether he exercised that degree of care and circumspection which a child of his years and maturity of judgment would be expected to exercise.

In the case of *Wendell v. N. Y. C. & H. R. R. R. Co.* (91 N. Y. 420) the plaintiff's intestate, a boy of seven years of age, was held to have been guilty of culpable negligence, it appearing that he was a bright, active boy, capable of understanding the peril of the situation which he recklessly encountered, resulting in his death.

In *Stone v. Dry Dock Railroad Company* (115 N. Y. 104) the plaintiff's intestate, a child of seven years, was run over by a street car, and in that case it was held that he could not be deemed as a matter of law to be *sui juris* so as to be chargeable with negligence, but that it presented a question for the jury.

In the *Reynolds* case (58 N. Y. 248) a bright and intelligent boy, thirteen years of age, was killed while crossing a railroad track. The summer before he had worked on a farm and received thirteen dollars a month and board for his services.

but at the time of the accident he was living at home attending school. The plaintiff was unable to show that his intestate observed that care which was required of persons crossing a railroad track, and the court having under consideration the distinction which the law makes between those who are *sui juris* and *non sui juris*, held that the plaintiff should have been nonsuited.

The fact that the boy Tucker was twelve years old, intelligent, accustomed to attend school, and assist the family by his labor, and lived near the railroad, seems to bring this case within the rule of the *Reynolds* case, indeed we see no opportunity to distinguish them.

Aside from evidence of the boy's age, no fact was adduced tending to show that he was not as well qualified to understand and appreciate the danger which overtook him as an adult. And the question is, therefore, fairly presented whether a jury can be permitted to find from such fact, standing alone, that he was *non sui juris*.

In *Nagle v. A. V. R. R. Co.* (88 Penn. St. 35) the court, in considering the age at which an infant should be presumed to be *sui juris*, say: "The law fixes no arbitrary period when the immunity of childhood ceases and the responsibilities of life begin. For some purposes majority is the rule. It is not so here. It would be irrational to hold that a man was responsible for his negligence at twenty-one years of age, and not responsible a day or a week prior thereto. At what age then must an infant's responsibility for negligence be presumed to commence? This question cannot be answered by referring it to a jury. That would furnish us with no rule whatever. It would give us a mere shifting standard affected by the sympathies or prejudices of the jury in each particular case. One jury would fix the period of responsibility at fourteen, another at twenty or twenty-one. This is not a question of fact for the jury; it is a question of law for the court. Nor is its solution difficult. The rights, duties and responsibilities of infants are clearly defined by the text writers as well as by numerous decisions. We have seen that the law

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presumes that at fourteen years of age an infant has sufficient discretion and understanding to select a guardian and contract a marriage, is capable of harboring malice and of taking human life under circumstances that constitute the offense of murder. It, therefore, requires no strain to hold that at fourteen an infant is presumed to have sufficient capacity and understanding to be sensible of danger, and to have the power to avoid it. And this presumption ought to stand until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of fourteen years of age."

The Penal Code provides that when an infant is charged with crime, upon the prosecution rests the burden of showing that the defendant has sufficient intelligence and maturity of judgment to render him capable of harboring a criminal intent until the age of twelve years, at which time the presumption of incapacity ceases. Now, while this statute does not undertake to prescribe, and does not necessarily affect the rule to be applied in civil actions, it suggests, as asserted in the *Nagle* case, an age to which the courts can with safety limit the presumption of incapacity on the part of an infant to appreciate the perils incident to crossing railroad tracks. This presumption may, in a proper case, be so far overborne by evidence as to present a question for the jury, and then the age of the injured party may doubtless be considered by the jury in connection with the facts indicating a lack of comprehension of a dangerous situation. But in the absence of evidence tending to show that an injured infant twelve years old was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track which an adult would, he must be deemed *sui juris*.

The views expressed lead to the conclusion that the judgment should be reversed.

All concur except BRADLEY and VANN, JJ., dissenting.

Judgment reversed.

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JOSEPHINE SIMMONS et al., as Administrators, etc., Respondents,
v. GILES EVERSON et al., Appellants, Impleaded, etc.

Persons who, by their several acts or omissions, maintain a public or common nuisance, are jointly and severally liable for such damages as are the direct, immediate and probable consequences of it.

In an action to recover damages for alleged negligence causing the death of S., plaintiffs' intestate, these facts appeared: The defendants E., P. and L., were owners of three adjoining lots on a city street, upon which there were three brick stores, separated by partition walls, extending from the foundations to the roofs; the fronts of said stores were a continuous brick wall of a uniform thickness, which was interlocked with the partition walls. These stores were burned, leaving the front wall and a part of the partition walls standing. The front wall shortly after began to lean toward the street and continued to do so more and more, until it gave way near the partition wall which separated the buildings of L. and P., carrying down the entire front. Material from the part of the front wall standing on the lots of E. and P., and from their partition wall, fell upon S., who was lawfully on the sidewalk, near the boundary between their lots, and killed him. No part of L.'s wall touched him. *Held*, that the evidence justified findings that the walls left standing became immediately after the fire unsafe, dangerous and liable to fall into the street, and so were a public nuisance; that each of the defendants E., P. and L. was negligent in not removing or supporting the walls on his lot; that the several neglects united and directly caused the walls to fall; and so, that they were jointly liable.

Chipman v. Palmer (77 N. Y. 51), distinguished.

(Argued January 29, 1891; decided February 24, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made September 9, 1890, which affirmed so much of a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Circuit, as was against the defendants Everson, Pierce and Lynch, and reversed so much as was against the defendant, the City of Syracuse, and as to said defendant granted a new trial.

This action was brought to recover damages for the death of Myron W. Simmons, plaintiffs' intestate, which was alleged to have been caused by the defendants' negligence.

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The trial court found that for many years prior to October 18, 1887, the appellants owned in severalty three lots, each being twenty-two feet wide, and bounded on the east by the center line of South Salina street, in the city of Syracuse. The south lot was owned by the defendant Lynch, the middle one by the defendant Pierce and the north one by the defendant Everson. On these lots stood three brick stores, separated from each other by brick partition walls extending from the foundations to the roofs. A continuous brick wall of uniform height (about 60 feet), and thickness, stood adjacent to the west line of the street and formed the front of the buildings. The partition walls and the front wall were interlocked or built together.

On the date mentioned the three stores were substantially destroyed by fire, nothing being left standing except the front wall, a part of the partition walls and a small part of the wood work in the front of Everson's building. Shortly after this event the front wall began to lean toward the street, and continued to incline more and more in that direction until November 17, 1887, when it gave way near the point where it was united with the partition wall between the buildings of Lynch and Pierce, carrying down the entire front and part of both partition walls. Material from the part of the front wall standing on the lots of Everson and Pierce, and from their partition wall, fell on and killed the plaintiffs' intestate, who was lawfully on the sidewalk near the boundary between their properties. No part of the walls on Lynch's lot fell on decedent. It was found that immediately after the fire the front and part of the partition walls became weak, unsafe, dangerous and liable to fall into the street, and that each of the defendants was careless and negligent in not removing or supporting the walls on his own lot, and that the several neglects of the defendants united and directly caused the walls to fall. It was further found that these walls were so unsafe that they were a public nuisance, and also that the decedent did not negligently contribute to the accident or to his own death. The damages were assessed at \$5,000.

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M. M. Waters for appellant Everson. Everson is not to be presumed to have violated his duty in acting upon the theory that neither Pierce nor Lynch would be guilty of negligence, resulting in injury to him and the deceased. (*Nevesen v. N. Y. C. R. R. Co.*, 29 N. Y. 383, 389.) An act or omission of duty, several when committed, cannot be made joint, because of the consequences which follow in connection with others who had done the same or similar acts. (*Chapman v. Palmer*, 77 N. Y. 51, 73.)

Smith, Kellogg & Wells for appellant Pierce. Plaintiffs' intestate was a trespasser on the premises of the defendant, and, therefore, cannot recover. (Smith on Negligence, 61; *Larmour v. C. P. I. Co.*, 101 N. Y. 391; *Converse v. Walker*, 30 Hun, 596; *P. R. R. Co. v. Bingham*, 29 Ohio St. 364; *Parker v. P. P. Co.*, 69 Me. 173; *Vanderbeck v. Hendry*, 34 N. J. L. 467; *J. R. R. Co. v. Goldsmith*, 47 Ind. 43; *Zobisch v. Tarbell*, 10 Allen, 385; *McAlpin v. Powell*, 70 N. Y. 126; *Siceeny v. O. C. & N. R. Co.*, 10 Allen, 368; *Nicholson v. E. R. Co.*, 41 N. Y. 525; *Leary v. C. R. Co.*, 78 Ind. 323; *Tallman v. S. B. & N. Y. R. Co.*, 98 N. Y. 198; *Hartfield v. Roper*, 21 Wend. 615; *Rathbun v. Payne*, 19 id. 399; *Barker v. Savage*, 45 N. Y. 191.) The damage sustained by the plaintiffs' intestate is not the ordinary or probable consequences of leaving the defendant Pierce's wall standing. While a person who does a wrongful act is answerable for all consequences that may ensue in the ordinary and natural course of events, though such consequences be immediately and directly brought about by intervening causes, still such intervening causes must be set in motion by the wrong-doer. (Thomp. on Neg. 1084; *Lowry v. M. R. Co.*, 99 N. Y. 158; *Ring v. City of Cohoes*, 77 id. 83; *Cartar v. Town*, 103 Mass. 407; *Hofnagle v. R. R. Co.*, 55 N. Y. 608; *Parker v. City of Cohoes*, 10 Hun, 531; *Ryan v. N. Y. C. R. R. Co.*, 35 N. Y. 209.)

Hiscock, Doheny & Hiscock for appellant Lynch. The deceased was guilty of contributory negligence and, therefore,

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cannot recover. (*Victory v. Baker*, 67 N. Y. 366; *Livermore v. C. P. I. Co.*, 101 id. 391; *Leary v. C. R. Co.*, 78 Ind. 328; *Converse v. Walker*, 30 Hun, 596.) The falling of the wall of the Lynch building was not the proximate cause of the death of the deceased. (*Ryan v. N. Y. C. & H. R. R. Co.*, 35 N. Y. 210; *Reiper v. Nichols*, 31 Hun, 401; *Read v. Nicholas*, 28 N. Y. S. R. 867.)

William Nottingham for respondents. A dangerous wall or structure of any kind, which is so near the public highway as to menace the safety of persons traveling or lawfully being thereupon, is a public nuisance, and for a failure to remove it both the owner of the property upon which it stands and the person or body corporate charged with the oversight of the highway, are liable to anyone who may be injured by its falling. (*Regina v. Watts*, 1 Salk. 356; *Rector, etc., v. Buckhart*, 3 Hill, 198; *Mullen v. St. John*, 57 N. Y. 567; *Vincett v. Cook*, 4 Hun, 318; *Hume v. Mayor, etc.*, 74 N. Y. 264; *Kiley v. City of Kansas*, 69 Mo. 102; *Parker v. Mayor, etc.*, 39 Ga. 725; *H. W. Co. v. Orr*, 83 Penn. St. 332; *Schilling v. Abernethy*, 112 id. 437; *Cain v. City of Syracuse*, 95 N. Y. 89; *Dygert v. Schenck*, 23 Wend. 446; *Congreve v. Smith*, 18 N. Y. 79; *Irvine v. Wood*, 51 id. 224; *Wasmer v. D., L. & W. R. Co.*, 80 id. 212.) From the mere fact that this wall fell into the public street and injured the plaintiff, the law presumes negligence on the part of the property owners and the burden is cast upon them of furnishing some explanation which is consistent with proper care upon their part. (*Byrne v. Boadle*, 2 H. & C. 722; *Scott v. L. D. Co.*, 3 id. 596; *Kearney v. L. R. R. Co.*, L. R. [5 Q. B.] 411; *Curtis v. R. & S. R. R. Co.*, 18 N. Y. 534; *Edgerton v. N. Y. & H. R. R. Co.*, 39 id. 227; *Seybolt v. N. Y., L. E. & W. R. R. Co.*, 95 id. 562; *R. M. Co. v. N. H. S. Co.*, 50 id. 121; *Mulcairns v. City of Janesville*, 67 Wis. 24; *H. W. Co. v. Orr*, 83 Penn. St. 332.) The negligence of each of defendants co-operated with the negligence of the others to produce the injury and, therefore, each separately

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and all together are holden to the party injured. (*Chapman v. N. H. R. R. Co.*, 19 N. Y. 341; *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 id. 492; *Webster v. H. R. R. Co.*, 38 id. 260; *Barrett v. T. A. R. R. Co.*, 45 id. 628; *Slater v. Mersereau*, 64 id. 138; *Masterson v. N. Y. C. & H. R. R. Co.*, 84 id. 247; *Ring v. City of Cohoes*, 77 id. 90; *Cone v. D., L. & W. R. R. Co.*, 81 id. 206; *Stringham v. Stewart*, 100 id. 516.) The action was properly brought against defendants jointly. (*Suydam v. Moore*, 8 Barb. 358; Code Civ. Pro. §§ 488, 499; *Fish v. Hose*, 59 How. Pr. 238.) Simmons did the best he could to extricate himself from the peril in which defendants' negligence placed him. His presence at the place of the accident was not contributory negligence, because it did not cause the wall to fall. It was a mere accident of location. (*Coulter v. A. U. E. Co.*, 56 N. Y. 585; *Twomley v. C. P., etc., R. R. Co.*, 69 id. 158; *Platz v. City of Cohoes*, 89 id. 219, 223; *Voak v. N. C. R. R. Co.*, 75 id. 320; *Bullock v. Mayor, etc.*, 99 id. 654, 656; *Gordon v. City of Richmond*, 83 Va. 436, 441.)

FOLLETT, Ch. J. It is urged, in behalf of the defendants, that at most this is but a case of several independent acts of negligence committed by each, the joint effect of which caused the accident, and for which they are not jointly liable within the rule laid down in *Chipman v. Palmer* (77 N. Y. 51).

The case at bar does not belong to the class of actions arising out of acts or omissions which are simply negligent, and while the defendants did not intend by their several acts to commit the injury, their conduct created a public nuisance which is an indictable misdemeanor under the statutes of this state (Penal Code, §§ 385, 387; *Vincett v. Cook*, 4 Hun, 318) and at common law. (*Regina v. Watts*, 1 Salk. 357; *S. C.*, 2 Ld. Raym. 856; 1 Russ. Cr. [5th ed.] 423; 2 Whar. Cr. Law, § 1410; Big. Torts, 237; Pol. Torts [2d ed.] 345; Stephens Dig. Cr. Law, art. 176; Indian P. C. § 268.)

Persons who by their several acts or omissions maintain a public or common nuisance, are jointly and severally liable for

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such damages as are the direct, immediate and probable consequence of it. (*Irvine v. Wood*, 51 N. Y. 224, 230; *Slater v. Mersereau*, 64 id. 138; *Timlin v. Standard Oil Co.*, 54 Hun, 44; *Klauder v. McGrath*, 35 Penn. St. 128; 1 *Shear. & R. Neg.* [4th ed.] § 122; *Pol. Tort* [2d ed.] 356.)

The fall of these four-story brick walls into the street, was the direct and immediate consequences of the several acts of the defendants in suffering the portions standing on their own lots to remain unsupported after they had visibly begun to incline towards the street, and it was as obvious before as it was after the accident that if any part of the front wall fell, a large part of it must, and that it would go into the street.

The judgment should be affirmed, with costs.

All concur, except VANX, J., not voting.

Judgment affirmed.

CHARLES E. O'CONNOR, as Receiver, etc., Respondent and Appellant, v. THE MECHANICS' BANK, Appellant and Repondent.

An ordinary uncertified check upon a general bank account is neither a legal nor an equitable assignment of any part of the sum standing to the credit of the depositor, and confers no right upon the payee which he can enforce against the bank.

Such a check is simply an order which may be countermanded and payment forbidden by the drawer at any time before it is actually cashed.

The rule that when deposits are received by a bank, unless they are special deposits, they belong to it as a part of its general funds, and the relation of debtor and creditor arises between it and the depositor, applies where the deposit is of trust money, unless the act of depositing it is a misappropriation of the fund.

One B. died leaving a will, by which he gave his residuary estate to his executors in trust, for the benefit of his four children, with power to sell all or any part thereof, and directed that the same be distributed "in such manner and form and at such time or times as shall in their judgment be for the best interests of my said children." The executors sold a portion of the personal property and deposited a portion of the proceeds in the defendant's bank to the credit of the estate of B. Said executors made an apportionment among all the legatees, and drew a check on defendant to the order of F., one of the legatees, for a balance

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due him and mailed it to him. F. indorsed the check in blank, and, after passing through several hands, it was paid by defendant March 10, 1888, in the usual course of business. It was not certified and had not been presented before. Prior to such payment a judgment had been recovered against F., and a third-party order in supplementary proceedings based thereon granted and served upon defendant's cashier; this order contained the usual injunction clause. Plaintiff was appointed receiver; after he had qualified, he demanded of defendant the amount on deposit in the account of the estate of B. belonging to F., "or due him from it;" this demand was refused. F. had no notice of the proceedings in which plaintiff was appointed receiver. In an action to recover the portion of the deposit alleged to belong to F., *held*, that in order to recover plaintiff was bound to show that when the order was served on defendant, it had in its possession or under its control certain personal property then belonging to F., or that it then owed him a debt; that the relation between B.'s executors and defendant was that of creditor and debtor only, and in a legal sense they had no money in the bank, but simply a debt against it to the amount of the deposit; that the apportionment and distribution being simply an agreement by the executors among themselves, and so, subject to revocation, and being unaccompanied by any assignment, oral or written, although followed by the giving of a check by them, did not effect a change of title to said debt or any part thereof, or operate as a transfer to the payee of any right as against the bank; and so, that plaintiff failed to establish a cause of action.

Risley v. Phenix Bank (83 N. Y. 818); *Van Alen v. Am. Nat. Bank* (52 id. 1); *Baker v. N. Y. Nat. Ex. Bank* (100 id. 81); *Viets v. Un. Nat. Bank* (101 id. 563), distinguished.

O'Connor v. Mechanics' Bank (54 Hun, 272), reversed.

(Argued January 30, 1891; decided February 24, 1891.)

CROSS-APPEALS from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 7, 1889, which modified and affirmed as modified a judgment in favor of plaintiff entered upon a decision at Circuit upon a trial without a jury.

This was an action at law by a receiver, appointed in proceedings supplementary to execution, to recover a sum of money deposited by a third party with the defendant, and alleged to belong to the judgment debtor.

The judgment, upon which plaintiff's appointment as receiver is based, was recovered April 2, 1886, against Herbert F.

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Beecher. On the 8th of March, 1887, Henry Ward Beecher, father of the judgment debtor, died, leaving a will, that was duly proved in April following, by which he gave his residuary estate to his executors in trust for the benefit of his children, four in number, with power to sell all or any part thereof, and directed that the same should be distributed "in such manner and form and at such time or times as shall in their judgment be for the best interests of my said children." The estate consisted of both real and personal property of considerable value, and the executors, Henry B. and William C. Beecher and Samuel Scoville, having sold a part of the personalty, deposited the proceeds in different banks, one of which was the defendant, the account being entitled: "Estate of Henry Ward Beecher." Checks were drawn upon this account in the due administration of the estate, each being signed either by Henry B. or William C. Beecher, as "Executor." The trial court found, in addition to the foregoing facts, "that in the first part of January, 1888, said executors made a distribution among all the legatees under the said will of said fund so deposited by them and apportioned about \$5,000 thereof as the share of the said judgment debtor." It does not appear how such apportionment and distribution was made, except that Henry B. Beecher, on January 30, 1888, drew a check on said account to the order of the judgment debtor for \$2,286.92, being the balance due him after paying certain debts pursuant to his instructions, and mailed it to him at Port Townsend, Washington Territory, where he resided. He indorsed it in blank, and, after passing through several hands, it was paid by the defendant March 10, 1888, in the usual course of business. It was never certified and had not been presented before. January 27, 1888, a third-party order, based upon said judgment, was obtained for the examination of William C. Beecher, and the next day was served upon him, and on February first he appeared and was examined. A like order for the examination of defendant's cashier was granted and served on the day last named, and the next day an examination was had thereunder and further proceedings were adjourned until March 21,

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1888. Each order contained the usual injunction clause. From December 19, 1887, to February 2, 1888, said account in the defendant bank was not less than \$4,644.71, and thenceforward to February eleventh, it stood at \$1,038.49, and after that date until March tenth, at \$2,428.54.

February 3, 1888, the plaintiff was appointed receiver under the first of said orders and next day the receivership was extended to the proceedings under the second order. On the ninth of February, and after the plaintiff had qualified, he demanded from the defendant that it should pay him "the sum of \$2,286.92, amount on deposit in said bank in the said account of the estate of Henry Ward Beecher," and deliver all money or property in its custody or control belonging to the judgment debtor, "or due him from it," but the demand was refused, and February 27, 1888, this action was commenced. Herbert F. Beecher had no notice of the proceedings which resulted in the appointment of the plaintiff as receiver.

As conclusions of law, the court found that all funds deposited by the executors were trust funds and that the bank had notice of the fact; that upon the apportionment and distribution by the executors, the share of the judgment debtor became vested in him and subsequently passed to the plaintiff as receiver, in whose favor judgment was ordered for the sum of \$1,300, which was fixed upon as the amount necessary to cover the judgment for \$484 with interest thereon, together with the costs and receiver's expenses.

Upon appeal by both parties to the General Term, the judgment was modified by reducing the recovery to \$692.65, and as thus modified affirmed.

Both parties now appeal to this court, the plaintiff claiming the right to recover the entire fund in controversy, while the defendant claims that there should be no recovery whatever against it.

Edwin R. Leavitt for plaintiff. The property of the judgment debtor vested in the plaintiff as soon as the order appointing him receiver was filed, namely, February 4, 1888.

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(Code Civ. Pro. §§ 1819, 2468, 2469; *McCorkle v. Herrman*, 117 N. Y. 297; *Loder v. Hatfield*, 71 id. 92, 98; *Bushnell v. Carpenter*, 92 id. 270; *Goebel v. Wolf*, 113 id. 405; *Warner v. Durant*, 76 id. 133; *Bartholomew v. Adams*, 8 N. Y. Supp. 179; *Delafield v. Shipman*, 103 N. Y. 466; *Vincent v. Newhouse*, 83 id. 505; *Harris v. Fly*, 7 Paige, 471; *Chase v. Beecher*, 6 N. Y. Supp. 227; *Manice v. Manice*, 43 N. Y. 363; *Viets v. U. N. Bank*, 101 id. 568; *Baker v. N. Y. N. E. Bank*, 100 id. 35.) A check is not an assignment of, nor a lien upon, the funds against which it is drawn. (*Lowrey v. Stewart*, 25 N. Y. 241; Story on Bills of Exchange, § 86; *Atty.-Gen. v. C. L. Ins. Co.*, 71 N. Y. 325; *Luieth v. Bank of America*, 49 Barb. 221; *Æ. N. Bank v. F. N. Bank*, 46 N. Y. 82; *Duncan v. Berlin*, 60 N. Y. 151, 153; Code Civ. Pro. § 1819; *Rundle v. Allison*, 34 id. 180-183.) The bank, by the very title of the account, and the fact of checks being signed "Executor," had full notice of the character of the account; for, where deposits are made in a bank by any one as agent, executor, trustee, etc., the use of such terms charges the bank with notice. (Daniels on Neg. Inst. [3d ed.] § 1612; *N. Bank v. Ins. Co.*, 104 U. S. 64, 65; Code Civ. Pro. §§ 2468, 2469.) The whole fund of \$2,286.92 not only vested in plaintiff, but he was entitled to receive the whole of it. (Code Civ. Pro. §§ 2468, 2469; *Renald v. Wyckoff*, 8 J. & S. 529; *Salter v. Bowe*, 32 Hun, 237; High on Receivers, §§ 447, 449; *Campbell v. Grant*, 2 Hilt. 290, 296; *Browning v. Betts*, 8 Paige, 508; *Bostwick v. Menck*, 40 N. Y. 383; *Verplanck v. Van Buren*, 76 id. 255; *Merrill v. Bank of Norfolk*, 18 Pick. 32.) The plaintiff is a proper person to receive the whole. (*Goodhart v. Stilton*, 90 N. Y. 206; *Gelston v. S. S. Bank*, 29 Hun, 597.) The court had power to modify the judgment by increasing it. (Code Civ. Pro. § 1317; *Canady v. Stiger*, 55 N. Y. 456; *Moffat v. Sackett*, 18 id. 528; *Richardson v. H. Ins. Co.*, 15 J. & S. 138; *Simonson v. Brown*, 68 N. Y. 355; *Hannah v. Hannah*, Id. 610, 611; *Bennett v. Bates*, 94 id. 354.)

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William C. Beecher for defendant. A check upon a bank in the usual form, not accepted, or certified by its cashier to be good, does not constitute a transfer of any money to the credit of the holder. It is simply an order which may be countermanded and payment forbidden by the drawer at any time before it is actually cashed. It creates no lien on the money which the holder can enforce against the bank. It does not of itself operate as an equitable assignment. (*F. M. Co. v. Brown*, 124 U. S. 385; *Atty.-Gen. v. C. Ins. Co.*, 71 N. Y. 325; *Lynch v. F. N. Bank*, 107 id. 179; *Vietz v. U. Bank*, 101 id. 563; *Æ. Bank v. F. N. Bank*, 46 id. 82, 87; *Bank of Republic v. Millard*, 10 Wall. 152; *Carr v. N. S. Bank*, 107 Mass. 45; *Chapman v. White*, 2 Seld. 412; *Crawford v. W. S. Bank*, 100 N. Y. 50.) The court below erred in holding that the deposit was a trust fund created for the benefit of the legatees, and such legatees, as soon as their shares were fixed and set aside, would be entitled to them, and could have sued the bank and collected the same from it. (*Fletcher v. Sharpe*, 108 Ind. 276; *McLain v. Wallace*, 103 id. 562; *Butler v. Sprague*, 66 N. Y. 392, 395.) The receiver took title only to such property as belonged to the judgment debtor when the proceedings were commenced and the receiver appointed. (*DuBois v. Cassidy*, 75 N. Y. 298; *Thorn v. Fellows*, 5 Wkly. Dig. 473.) The statement of the account with the bank shows very plainly that it was not a fund set apart for the benefit of the legatees, but simply the current account of the estate used in the general transaction of its affairs. This is a very different thing from a trust fund in which a legatee had any specific interest. (*N. Bank v. Ins. Co.*, 104 U. S. 54, 63.) The check having been indorsed generally to Laidlaw & Co., and not for collection, became their property, the title passed to them, and was not again subject to the payee's control. (*M. Bank v. Loyd*, 90 N. Y. 530; *Vietz v. U. Bank*, 101 id. 563; *Van Allen v. A. Bank*, 52 id. 4; Code Civ. Pro. § 2469; *Bank of Republic v. Millard*, 10 Wall. 152, 156.) The judgment debtor was never

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served in supplementary proceedings, and no notice was given him as required by law. (Code Civ. Pro. § 2464; *Whitney v. Welch*, 2 Abb. [N. C.] 442; *Ashley v. Turner*, 22 Hun, 226; *Stokes v. Epstein*, 6 Civ. Pro. Rep. 36.) Plaintiff's contention that the judgment should have been for the whole amount of the check is untenable. (*Bostwick v. Menek*, 40 N. Y. 383; *High on Receivers*, §§ 454, 455; Code Civ. Pro. § 3320.)

VANN, J. This is not a creditor's bill to establish a lien, or to remove an obstacle to the collection of a debt, but a strict action at law to recover a definite sum of money from the defendant. It does not involve the right of the plaintiff to proceed against the executors, or to collect the debt that he represents out of any interest which the judgment debtor may have in his father's estate. In order to recover in this action the plaintiff was bound to show that when the third-party order was served upon the defendant, it had in its possession or under its control certain personal property then belonging to the judgment debtor, or that it then owed him a debt exceeding ten dollars in amount. (Code Civ. Pro. §§ 2441, 2468 and 2469; *McCorkle, as Recr., v. Herrman*, 117 N. Y. 297.) The real question, therefore, is whether the bank was owing the judgment debtor anything, or had any of his property in its possession or under its control? The deposit by the executors with the defendant of money received by them from the sale of the personalty, the apportionment thereof among the legatees and the mailing of the check, form the basis upon which the plaintiff rests his claim that the bank either owed a debt to the judgment debtor or was possessed of some property belonging to him. As the legal title to the personal property before it was sold was in the executors, so the legal title to the proceeds of the sale was in them. When they deposited the proceeds in the bank, however, the title to the money passed to the defendant, which impliedly promised to pay the debt thereby created by honoring the checks of the depositor as they were presented. Thenceforward the relation of the bank and the executors was that of debtor and creditor only.

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In a legal sense the executors had no money in the bank, but simply a debt against the bank for the amount of the deposit. (*Ætna National Bank v. Fourth National Bank*, 46 N. Y. 82, 86; *Viets v. Union National Bank*, 101 id. 563, 573; *Lynch v. First National Bank*, 107 id. 179, 184.) Therefore, unless this debt, which the executors held against the defendant, was in some way transferred, wholly or in part, to Herbert F. Beecher, there can be no recovery by the plaintiff who has simply the title of the judgment debtor. There was no transfer of the debt unless the apportionment and distribution by the executors and the giving of the check by them effected a change of title thereto. The apportionment and distribution was apparently a mere agreement by the executors among themselves, subject to revocation or change at any time before actual performance. No assignment was made either in writing or even by oral agreement, as was the fact in the case of *Risley v. Phenix Bank* (83 N. Y. 318). The mere determination of the executors to apportion and distribute among the legatees certain funds on hand, accompanied by no act of performance, transferred no title or interest therein to anyone, and had no effect upon the debt against the bank which had no notice that a distribution was intended or that any special fund was set apart for that purpose. No act either of apportionment or of distribution was shown, except the giving of the check, and that did not operate as a transfer to the holder of any right as against the bank. An ordinary, uncertified check upon a general account is neither a legal nor an equitable assignment of any part of the sum standing to the credit of the depositor, and confers no right upon the payee that he can enforce against the bank. (*Attorney-General v. Continental Life Ins. Co.*, 71 N. Y. 325; *Duncan v. Berlin*, 60 id. 151; *Ætna National Bank v. Fourth National Bank*, *supra*; *Chapman v. White*, 6 N. Y. 412; *Carr v. National Security Bank*, 107 Mass. 45, 48.)

Such a check, as was said by the Supreme Court of the United States in a recent case, "is simply an order which may be countermanded and payment forbidden by the drawer at

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any time before it is actually cashed." (*Florence Mining Co. v. Brown*, 124 U. S. 385, 391.)

The rule is otherwise when the check or order is drawn upon a particular fund which is specified, but that has no application to this case, because the check in question was in the ordinary form and was drawn upon no particular or specified fund. There was no transfer, therefore, by the executors to the judgment debtor of any part of their claim against the bank, and the plaintiff had no title upon which to found this action unless it was derived from some source other than the executors. Even if the judgment debtor, after the delivery of the check to him, could have compelled the executors to pay it, still he could not have compelled the bank to pay it, because there was no contract between him and the bank, and no assignment of any interest in the contract between the executors and the bank. The holder of an ordinary check, unaccepted and uncertified, cannot compel payment from the bank upon which it is drawn, even if the account of the drawer is sufficient to meet it when presented. Under such circumstances the right of action belongs to the drawer or creditor of the bank and not to the holder who is merely a stranger. (*Viets v. Union National Bank*, 101 N. Y. 563, 572; *Etna National Bank v. Fourth National Bank*, *supra*; *Winter v. Drury*, 5 N. Y. 525.)

The courts below proceeded to judgment upon the theory that the moneys were deposited by the executors as the property of the estate, and upon the apportionment between the legatees became impressed with a trust in favor of the judgment debtor. In support of this position certain cases were relied upon which hold that a bank dealing with the agent of a disclosed principal, who not only owned the moneys deposited, but held the check of the agent therefor, could not refuse to pay such check. (*Van Alen v. American National Bank*, 52 N. Y. 1; *Baker v. New York National Exchange Bank*, 100 id. 31; *Viets v. Union National Bank*, 101 id. 563.) The principle underlying these authorities, as stated in the case first cited (p. 4), is "that so long as money or property belonging

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to the principal, or the proceeds thereof, may be traced and distinguished in the hands of the agent, or his representatives, or assignees, the principal is entitled to recover it unless it has been transferred for value without notice." In other words, when the debt created by a deposit belongs to the principal, instead of the agent who made it in his own name, the bank, upon notice of the facts, must recognize the actual rather than the nominal depositor. This principle is frequently applied by courts of equity to prevent a misappropriation of trust funds, but it does not apply to the case in hand, because no attempt at misappropriation is claimed, and because this is an action at law where the judgment debtor was not the principal and the executors were not his agents in the sense required to change the relation between the depositor and depositary.

As was said in *Fletcher v. Sharpe* (108 Ind. 276), "When deposits are received, unless they are special deposits, they belong to the bank as a part of its general funds, and the relation of debtor and creditor arises between the bank and the depositor. This is equally so whether the deposit is of trust money, or funds which are impressed with no trust, provided the act of depositing is no misappropriation of the fund."

There had been no accounting by the executors when the receiver was appointed, and it was not yet time for them to account, as less than a year had passed since the will was admitted to probate. All the property of the testator, by force of the will, vested in the executors in trust for the benefit of the legatees. While the judgment debtor had a general claim to one-fourth of the net residuary estate, he had no title to any specific part, nor to the proceeds of any specific part, and his claim could not be enforced until after the time for an accounting had arrived. Prior to a judicial determination that all the debts of a testator have been paid, made after proper notice, all payments to legatees are at the peril of the executors, for the assets of an estate are held by them primarily for the benefit of creditors. The apportionment and distribution made by the trustees, as already appears, conferred no right upon the legatees, except as checks were given in per-

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formance and the checks conferred no right that was capable of enforcement against the bank.

Without considering any of the other points urged upon us, we think that the plaintiff, according to the record now presented, had no title to the debt against the defendant, created by the deposits of the executors. It follows that the judgment should be reversed and a new trial granted, with costs to abide the event. .

All concur.

Judgment reversed.

124 334
167 560

BENJAMIN DECKER, Respondent, v. G. CLINTON GARDNER, as
Receiver, etc., Appellant.

124 884
171 1494

It seems that jurisdiction to appoint a receiver of a corporation upon its dissolution is wholly statutory. Such a receiver is the representative of the corporate body and in this state he is vested with the title to and is made trustee of the corporate property, and for the purpose of administering thereon and winding up the affairs of the corporation, he succeeds to its powers and franchises and possesses generally all the powers and authority conferred by statute upon the assignees of insolvent debtors.

The power, however, of appointing a receiver, *pendente lite*, is incidental to the jurisdiction of a court of equity. Such a receiver is a mere temporary officer of the court; he does not possess the power of a permanent receiver or any legal power except such as is specifically conferred upon him by order of the court; his functions are limited to the care and preservation of the property committed to his charge.

While a receiver appointed *pendente lite*, in an action to foreclose a railroad mortgage, is charged with the duty of operating the road pending the action, the corporation is not dissolved by the appointment; the receiver does not represent the corporation in its individual or personal character, or supercede it in the exercise of its corporate powers, except so far as the mortgaged property is concerned, and in every respect except the possession and management of the mortgaged property the corporation is free to exercise its franchises.

During the pendency of an action against a railroad corporation for alleged trespass, a receiver *pendente lite* was appointed in an action in the U. S. Circuit Court to foreclose mortgages which covered all of the corporate property. The receiver was authorized to operate the road,

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protect his title and possession, defend all suits brought against him and the corporation, and intervene in any suits then pending; and was invested with the authority usually conferred in like cases according to the course and practice of U. S. Equity Courts; the corporation was enjoined from interfering with him in the possession and management of the property. The receiver was, by order of the court, substituted as defendant in the trespass suit; the order provided that the action proceed with like effect as if originally commenced against him. Upon the trial the receiver moved for a dismissal of the complaint on the ground that the action could not be maintained against him. The motion was denied. *Held*, error; that the receiver had no connection with the cause of action, and it could not be charged upon the property in his hands.

Pickergill v. Meyers (99 Penn. 602); *Coombs v. Smith* (78 Mo. 32), distinguished.

(Argued January 30, 1891; decided February 24, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 13, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict.

This action was brought originally against the Buffalo, New York and Philadelphia Railroad Company, to recover for a trespass alleged to have been committed by said company in May, 1884.

After the case was at issue, and in May, 1885, the defendant was appointed receiver of the property of said railroad company by the Circuit Court of the United States for the western district of Pennsylvania, in an action brought therein to foreclose general trust mortgages upon the railroad property. An action auxiliary to the aforesaid action was subsequently brought in the Circuit Court for the northern district of New York, and in such action said defendant was appointed receiver of said railroad in said district, and pursuant to such orders the defendant took possession of the mortgaged railroad property and continued in possession until the sale thereof under judgment of foreclosure entered in said actions.

By an order of the Supreme Court made in September, 1887, the receiver was substituted as defendant in this action in the place and stead of the railroad company, and it was pro-

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vided that the action proceed with like effect as if originally commenced against him. .

An amended complaint was served which alleged the incorporation of the railroad company, the trespass, the appointment of a receiver, and the order substituting him as defendant, and demanding judgment for damages.

The receiver pleaded a general denial, and upon the trial moved that the complaint be dismissed on the ground that the action could not be maintained against him. The exception to the denial of that motion presents the question discussed in the opinion.

John G. Milburn for appellant. This action is not maintainable against the receiver. (Jones on Mort. § 1516; Jones on Bonds, §§ 430, 475; *Hollenbeck v. Donnell*, 94 N. Y. 342; Beach on Receivers, §§ 1, 2, 330, 335, 359, 707, 708; High on Receivers, §§ 1, 2, 3; *Herring v. R. R. Co.*, 105 N. Y. 340; *Kincard v. Dwinelle*, 59 id. 548; *Pringle v. Woolworth*, 90 id. 502; *McCulloch v. Norwood*, 58 id. 562; *Honegger v. Wettstein*, 94 id. 252; *Ranney v. Peyser*, 83 id. 1; Laws of 1874, chap. 430, § 3; *Woodruff v. Jewett*, 115 N. Y. 267; *Arnold v. Bank*, 27 Barb. 424; *E. Co. v. R. R. Co.*, 99 U. S. 191; *T. Co. v. R. R. Co.*, 103 N. Y. 245; *Fleischauer v. Dittenhoffer*, 17 J. & S. 311; *Schmid v. R. R. Co.*, 32 Hun, 335.)

Frederick R. March for respondent. After G. Clinton Gardner was appointed receiver of the corporation, it was proper and necessary to have him substituted as defendant in the action. (High on Receivers, §§ 213, 259, 260, 315, 316; *Wilson v. Wilson*, 1 Barb. Ch. 592; Code Civ. Pro. § 1789.) Courts have power to enlarge the powers of the acts of receivers. (Laws of 1852, chap. 71, § 2; *Bangs v. Duckenfield*, 18 N. Y. 592.) The receiver is liable for tort. (*Combes v. Smith*, 78 Mo. 32, 38; *Curtiss v. Leavitt*, 15 N. Y. 46; *Pickersgill v. Meyers*, 99 Penn. St. 602.)

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BROWN, J. Jurisdiction to appoint receivers of corporations is wholly statutory.

The power to declare a forfeiture of corporate franchises was originally in England vested in the courts of law, and was exercised in a proceeding brought by the attorney-general in the name of the sovereign.

The Court of Chancery never assumed jurisdiction in such cases until it was conferred by act of parliament.

It declined until the power was conferred by statute to sequester corporate property through the medium of a receiver, or to dissolve corporate bodies, or to restrain the usurpation of corporate powers. (*A. & A. on Corp.* § 777; *Slee v. Bloom*, 5 Johns. Ch. 366-381; *Atty.-Genl. v. Utica Ins. Co.*, 2 id. 389.)

The courts of this country followed the English system. (*Atty.-Gen. v. Utica Ins. Co.*, *supra*; *Atty.-Gen. v. Bank of Niagara*, Hopkins' Rep. 354.) And the jurisdiction in such cases is now a subject of statutory regulation in most if not all the states.

In 1825 the legislature of this state authorized the Court of Chancery to sequester the property of corporations against whom judgment at law had been obtained and execution was returned unsatisfied, and to appoint receivers of the same, and to decree the dissolution thereof in cases of insolvency. (Chap. 325, Laws of 1825.) The system then inaugurated was continued by the Revised Statutes and subsequent legislation, and is known generally under the head of proceedings against corporations in equity. (2 R. S. 462; Code C. P. ch. 15, title 2.) The receivers authorized by statute to be appointed upon the dissolution of the corporation are the representatives of the corporate body, and generally are vested with the title to the corporate property, and, for the purpose of administering thereon and winding up the affairs of the corporation, succeed to its powers and franchises.

In this state they are vested with all the real and personal estate of the corporation, and are made trustees of such estate

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for the benefit of the creditors and stockholders, and possess generally all the powers and authority conferred by law upon the assignees of insolvent debtors. (2 R. S. p. 464, § 42; p. 469, §§ 67, 68; Code C. P. § 1788.)

Receivers appointed *pendente lite* are, however, mere temporary officers of the court, and do not possess the powers of a permanent receiver unless specially conferred upon them by order of the court. (Code C. P. §§ 1788, 1789; *Herring v. N. Y., L. E. & W. R. R. Co.*, 105 N. Y. 372, 375.) The Court of Chancery, however, possessed and exercised in many cases the power to appoint receivers *pendente lite* of property which was the subject-matter of litigation before the court. Such receivers possessed no legal powers. They were officers of the court merely, and their functions were limited to the care and preservation of the property committed to their charge, and they possessed no authority except such as the orders of the court conferred. (Pomeroy's Eq. Juris. Vol. 3, §§ 1331-1336; *Herring v. N. Y., L. E. & W. R. R. Co.*, *supra*; *Keeney v. Home Ins. Co.*, 71 N. Y. 396.) This power of appointment of a receiver *pendente lite* was one incidental to the jurisdiction of the court. It did not depend upon statute, and was not affected by the character of the parties before it, whether an individual or a corporation, or by the nature of the property. (*U. S. Trust Co. v. N. Y., W. S. & B. Ry. Co.*, 101 N. Y. 478.) Its most common exercise was in foreclosure suits whenever, by reason of the insufficiency of the security, it became necessary to impound the rents and profits of the mortgaged property during the litigation in order that they might, after the decree and sale, be applied upon the debt for the security of the mortgage. (*Hollenbeck v. Donnell*, 94 N. Y. 342; Jones on Mortgages, § 1516.) This particular jurisdiction has been extended to and is frequently exercised upon the foreclosure of mortgages upon railroads, and receivers of such property are charged with the duty of the operation of the road pending the foreclosure suit, to the end that the value of the property which necessarily depends largely upon the continuance of its business may not be depreciated, and

also to the end that its income may not be diverted to the payment and satisfaction of debts which are not liens upon the property.

While this class of receivers have many duties and powers peculiar to themselves, they are such only that flow from the nature and character of the property committed to their charge, and in their legal character and relation to the mortgagor they differ in no respect from the receiver of rents and profits of mortgaged property appointed in actions to foreclose mortgages against individuals.

They do not represent the corporation in its individual or personal character, nor supersede it in the exercise of its corporate powers except so far as the mortgaged property is concerned.

The corporation is not dissolved by the order appointing the receiver (*Kincaid v. Dwinelle*, 59 N. Y. 553; *Pringle v. Woolworth*, 90 id. 502), and it is clear that in an ordinary foreclosure suit no attack is made upon its corporate existence, and hence no judgment that can be entered in the action will affect its corporate life.

In every respect except the possession and management of the mortgaged property the corporation is free and unfettered to exercise its franchise. (Beach on Receivers, § 335.) Accordingly it has been held that after the appointment of a receiver and the sale of mortgaged property it was competent and lawful for stockholders to elect directors. (*State v. Merchant*, 37 Ohio St. 251.) That in an action under a statute against a corporation to recover for building a fence it was not a defense that at the time of doing the work the railroad was in the possession of a receiver appointed by a Federal Court in a foreclosure suit. (*O. & M. R. Co. v. Russell*, 115 Ill. 52.) That the fact that a railroad was in the possession of a receiver was no defense to the settlement of an account for taxes against the corporation. (*P. & R. R. Co. v. Commonwealth*, 104 Pa. 80.) In *U. S. Trust Co. v. N. Y., W. S. & B. R. Co.*, (101 N. Y. 478), the distinction between statutory receivers of corporations and receivers of mortgaged property was fully

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discussed and it was held that section 2 of chapter 378, Laws of 1883, had no application to the latter class.

In *Pringle v. Woolworth* (90 N. Y. 502), it was held that the plaintiff was not debarred from maintaining an action against an insurance company by the appointment of a receiver.

The question under discussion was substantially decided in *Arnold v. Suffolk Bank* (27 Barb. 424), and it was there held, in accord with the views here stated, that a receiver of a bank could not be joined as a defendant in an action against the bank on a money demand. In that case as here the cause of action arose before the receiver's appointment, and it was said by the court "that the mere fact that A. is the receiver of B. whether they be natural or artificial persons, will not justify a creditor of B. in bringing A. as a party into every suit against B. when the rights and remedies of the plaintiff end with B." A similar ruling was made in *Fleischauer v. Dittenhoefer*, (17 J. & S. 311). The respondent has cited but two cases to sustain the judgment. (*Pickersgill v. Myers*, 99 Penn. 602; *Combs v. Smith*, 78 Mo. 32.) In the Pennsylvania case the corporation was dissolved and the receiver appointed after dissolution. In the Missouri case, while the facts in reference to the appointment of a receiver are not stated, enough appears in the opinion of the court to indicate that the defendant was a statutory receiver. In that view the case is in harmony with the general current of authorities, but if the facts were otherwise it would not have our approval.

The defendant in this case was appointed by the Circuit Court in pursuance of its powers as a Court of Chancery. His functions were confined to the care and preservation of the mortgaged property, and his appointment gave him temporary management of the railroad under the direction of the court, nothing more.

The mortgage covered all the railroad property, real and personal, and hence all property of the corporation was placed in his possession.

He was authorized to operate the road, protect his title and possession, to defend all suits brought against him or the rail-

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road company, to intervene in any suits or proceedings then pending, and was invested with the authority and powers usually conferred upon receivers in like cases according to the course and practice of the courts of the United States sitting in equity. By the same order the corporation was enjoined from interfering with said receiver in the possession and management of the railroad property.

He did not represent the corporation or supersede it in the exercise of its powers, except in relation to the possession and management of the property committed to his charge.

Notwithstanding his appointment the corporation was clothed with its franchise and still existed. It could still exercise its power so it did not interfere with the management of the railroad. It could do many corporate acts and it could do all things necessary to preserve its legal existence.

It could sue and be sued, and was liable for its acts and upon its contracts and covenants the same as if the receiver had not been appointed.

With the particular cause of action set out in the complaint the defendant had no connection, and it could in no possible way be charged upon the property in the receiver's possession. (*Met. Trust Co. v. Tonawanda R. R. Co.*, 103 N. Y. 245; *Raht v. Attrill*, 106 id. 423.) For it the corporation was alone liable, and there was no legal obstacle to an action against it, and a judgment, if recovered, was collectable out of its available assets.

It follows from these views that the defendant was not a proper party to the suit, and that the action was not maintainable against him.

The judgment should be reversed.

All concur, except HAIGHT, J., not voting.

Judgment reversed.

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124	842
156	14

FREDERICK P. ALLEN, as Assignee, etc., Appellant, v. ISAAC
McCONIHE, Respondent.

In an action to recover a balance claimed to be due upon the purchase and sale by O., C. & Co., plaintiff's assignors, for defendant, of stocks purchased and carried upon margins, it appeared that in filling defendant's orders, O., C. & Co. made its purchases and sales, without his knowledge, through brokers in New York, who did not know that defendant was interested in the transaction, but who bought and paid for the stock ordered and carried them on margins for O., C. & Co. On August fifteenth, defendant directed O., C. & Co. to sell certain shares of stock so purchased for him at a price stated; this price could have been obtained until August twentieth, when the stock went down. O., C. & Co. neglected to sell as directed and did not notify defendant of such neglect until August twenty-ninth. On October seven, O., C. & Co. made a general assignment to plaintiff for the benefit of creditors; the brokers in New York sold the stock carried for defendant without his knowledge; he was not at that time in default to O., C. & Co. The referee found that defendant never assented to, waived or acquiesced in the failure of O., C. & Co. to sell as directed, and allowed him as damages the difference between the price at which he ordered the sale and the price at which said stock was sold. *Held*, no error; that defendant was not required, when he learned that his instructions to sell had not been executed, to notify O., C. & Co. that he abandoned all claim to the stock and held them responsible for its value; nor was he under any obligation, in order to protect his defaulting agents, to pay the purchase-price, take the certificates and sell them; and that the correct rule of damages was adopted.

Whelan v. Lynch (85 Barb. 326; 60 N. Y. 469), distinguished

(Argued February 2, 1891; decided February 24, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 23, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to recover a balance claimed to be due on an account arising on the purchase and sales of stocks by plaintiff's assignors for defendant.

From May 1, 1883, to October 7, 1887, G. Parish Ogden, John F. Calder and Gouverneur Ogden were partners under the name of Ogden, Calder & Co., doing business as stock

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brokers at Troy, N. Y. During this period the firm had been accustomed to accept the orders of the defendant for the purchase and sale on the New York Exchange of stocks and bonds. The purchases were always made and carried on margins usually equal to ten per cent of their market value. The firm had no connection with the stock exchange, but made its purchases and sales through Work, Strong & Co., brokers, in the city of New York, who bought and paid for the stocks ordered and carried them on margins for Ogden, Calder & Co. The New York brokers did not know the defendant, or that he was interested in any of the transactions, and he was not informed that the stocks ordered purchased by him were not paid for by Ogden, Calder & Co., but were carried by the New York brokers on margins and held as security for whatever might be due them on general account from the Troy firm. About May 31, 1887, Ogden, Calder & Co. delivered to the defendant a statement of the account between them made up to that date, which showed the amount due from him to them, and that they held for him, among other securities, 600 shares of Manhattan Consolidated stock. On the 15th of August, 1887, the defendant directed Ogden, Calder & Co. to sell 300 of the Manhattan shares for \$111 per share. The shares could have been sold for that price at any time between August fifteenth and twentieth, when they fell in the market and did not again sell for as much until after October eleventh of that year. Ogden, Calder & Co. neglected to sell as directed and did not notify the defendant of their neglect until August 29, 1887. On the thirty-first of that month Ogden, Calder & Co. rendered a statement to the defendant showing the securities purchased by them for him, the amount due them on account, and that they had sold, on the twenty-ninth of the same month (pursuant to his direction given on that date), 100 Manhattan shares for \$109.75 each, and had on hand 500 shares.

The referee found that the defendant never assented to, waived or acquiesced in the failure of the firm to sell as directed.

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October seventh, Ogden, Calder & Co. made a general assignment for the benefit of creditors to the plaintiff. And on the tenth, eleventh, and thirteenth of that month, Work, Strong & Co. sold the 500 Manhattan shares at ninety-seven dollars each, and credited the avails to Ogden, Calder & Co., whose assignee in turn credited them to defendant.

This sale was made without the knowledge of defendant, and he was not at that time in default with the Troy firm. January 31, 1888, the plaintiff rendered an account to the defendant showing that \$8,841.86 was due from him, which the referee found to be correct, less \$4,200, the difference between the price of 300 Manhattan shares at \$111 and ninety-seven dollars, with interest from August 16, 1887, which was allowed the defendant, and judgment was ordered for plaintiff for the remainder.

Geo. B. Wellington for appellant. The referee erred in charging Ogden, Calder & Co. as purchasers of the shares at 111. (*Whelan v. Lynch*, 60 N. Y. 469; *Wright v. Bank of Metropolis*, 110 id. 247; *Baker v. Drake*, 53 id. 211; *Hamilton v. McPherson*, 28 id. 72.)

J. K. Long for respondent. The appellant has no right to maintain this appeal. His appeal to the General Term was only from that part of the judgment of the trial court which allowed the defendant's counter-claim. (Code Civ. Pro. § 1337; *Kelsey v. Western*, 2 N. Y. 600; *Robertson v. Bullion*, 11 id. 243; *Derleff v. DeGraff*, 104 id. 661; *Bennett v. Van Syckle*, 18 id. 480; *Knapp v. Brown*, 45 id. 209; *Roosevelt v. Linkert*, 67 id. 447; *In re N. Y. C. & H. R. R. Co.*, 60 id. 112; *Hooper v. Beecher*, 109 id. 610; *Murphy v. Spaulding*, 46 id. 556; *Genet v. Davenport*, 60 id. 197; *Wolstenholme v. W. F. M. Co.*, 64 id. 272; *Carll v. Oakley*, 97 id. 633; *Goodsell v. W. U. T. Co.*, 109 id. 147; *Porter v. Smith*, 35 Hun, 119; *Halpin v. P. Ins. Co.*, 118 N. Y. 171; Code Civ. Pro. §§ 993, 994; *Healy v. Clark*, 120 N. Y. 642; *Cuswell v. Davis*, 58 id. 228; *Stewart v. Morss*, 79 id. 629;

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Thomson v. Bank of B. N. A., 82 id. 7; *Burnap v. N. Bank*, 96 id. 131; *Andrews v. Raymond*, 58 id. 676.) There is ample evidence in the case to sustain every finding of fact that has been excepted to, and when this is so and the General Term has affirmed the findings of the referee, this court has no power to review or disturb them. They are conclusive on appeal. (*Van Gelder v. Van Gelder*, 77 N. Y. 448; *Reynolds v. Robinson*, 82 id. 106; *In re Ross*, 87 id. 514; *Sherwood v. Hauser*, 94 id. 626; *Baird v. Mayor, etc.*, 96 id. 567; *Baldwin v. Doying*, 114 id. 454; *Hale v. B. L. Ins. Co.*, 120 id. 297; *Derham v. Lee*, 87 id. 605.) On his argument in the General Term, the appellant sought to induce the court to grant a new trial on the counter-claim on the ground that his recovery should have been increased by adding to the \$8,841.76 balance claimed by him in his complaint the \$200 which Ogden, Calder & Co. credit in their bill of particulars, September 1, 1887, and \$450 of the \$750 they credit therein as dividends October 1, 1887. This the court properly refused to do. (*Whitehead v. Kennedy*, 69 N. Y. 469; *S. O. Co. v. A. Ins. Co.*, 79 id. 510; *People v. M. M. P. Union*, 118 id. 109; *Salisbury v. Howe*, 87 id. 128; *Thayer v. Marsh*, 75 id. 342; *Adams v. I. N. Bank*, 116 id. 614; *Everson v. City of Syracuse*, 100 id. 578; *E. C. F. Co. v. Hersee*, 103 id. 25; *Thomson v. Bank of B. N. A.*, 82 id. 7; *Burnap v. N. Bank*, 96 id. 131.) In reviewing judgments rendered upon a trial before a court or referee, it is the duty of the appellate court to indulge in all reasonable presumptions in support of the judgment, and to assume when necessary that all the evidence in the case was considered, and a conclusion thereon, adverse to the appealing party, reached. (*Day v. Town of New Lots*, 107 N. Y. 148, 157; *Berdell v. Allen*, 116 id. 661; *Bishop v. Vil. of Goshen*, 120 id. 341; *Reese v. Boese*, 94 id. 623.) The burden of showing error is upon the appellant, and while this court will not look into the evidence to supply a fact not found, to overthrow the judgment, it may and will look into the evidence to supply a fact not found if that be necessary to sustain the judgment. (*E. C. F. Co. v.*

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Hersee, 103 N. Y. 25; *Everson v. City of Syracuse*, 100 id. 578; *Tracey v. Altmyer*, 46 id. 604; *West v. Van Tuyl*, 119 id. 620; *Costigan v. M. & H. R. R. Co.*, 2 Den. 609; *Howard v. Daly*, 61 N. Y. 371.) The defendant was not bound, as matter of law, to reiterate his order when he first learned it had been disobeyed, or at any time thereafter. (*Markham v. Jaudon*, 41 N. Y. 239; *White v. Smith*, 54 id. 526; *Levy v. Laub*, 85 id. 372; *Gillett v. Whiting*, 120 id. 402; *Gruman v. Smith*, 81 id. 25, 28; *Stenton v. Jerome*, 54 id. 483; *Scott v. Rogers*, 31 id. 678; *Baker v. Drake*, 53 id. 211; *Capron v. Thompson*, 86 id. 418; Sedg. on Dam. [6th ed.] 101, 402; S. & R. on Neg. §§ 31-38; *Hearey v. Hennen*, 2 Den. 627.) The referee was right in allowing a credit for the 300 shares of Manhattan at \$111 per share, the price at which it could have been sold had Ogden, Calder & Co. obeyed the defendant's order, instead of at ninety-seven dollars per share, at which price, after the assignment and unknown to the defendant, it was sold by Work, Strong & Co. on account of Ogden, Calder & Co., because that firm had failed. (*White v. Smith*, 54 N. Y. 527; *Norton v. Squires*, 16 Johns. 225; *Stearns v. Marsh*, 4 Den. 231; *Allen v. Brown*, 44 N. Y. 232; *Hope v. Lawrence*, 50 Barb. 265.) Besides the relation of principal and agent, there existed in this case between Ogden, Calder & Co. and the defendant, the relation of pledgor and pledgee, as between them they held his stocks in pledge as security for their account against him. (*Markham v. Jaudon*, 41 N. Y. 239; *Gruman v. Smith*, 81 id. 25; *Gillett v. Whiting*, 120 id. 402; *Norton v. Squires*, 16 Johns. 225; *Stearns v. Marsh*, 4 Den. 231; *Allen v. Brown*, 44 N. Y. 232; *Hope v. Lawrence*, 50 Barb. 265.) There would be neither justice nor right in granting the plaintiff a new trial. The parties cannot be remitted to their original position. (*Snyder v. Snyder*, 96 N. Y. 88; *In re Holbrook*, 99 id. 543.)

FOLLETT, Ch. J. Ogden, Calder & Co. undertook upon a sufficient consideration by way of commissions paid and margins furnished and to be furnished by the defendant, to carry

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the shares and sell them as directed or deliver to him certificates for them on payment of their purchase-price. This promise the plaintiff admits that his assignors broke by refusing to sell three hundred shares for \$111 each on the 15th of August, 1887, as directed, and in permitting Work, Strong & Co. to sell them in October following for \$97 each on account of an indebtedness owing them by Ogden, Calder & Co.

The referee allowed the defendant as damages for the breach of this promise \$14 per share, the difference between the price at which they should have been sold August fifteenth and the price at which they were sold in October.

The general rule for determining the amount of damages recoverable for the violation of a contract or the breach of a duty, is that the injured party is entitled to such as are the natural (or to be apprehended) direct and immediate results of the breach. (*Griffin v. Colver*, 16 N. Y. 489; *Hamilton v. McPherson*, 28 id. 72; *Hadley v. Baxendale*, 9 Exch. 341; *May. Dam.* 10.)

This rule is subject to the qualification that if the person injured thereafter negligently suffers his loss to be enhanced, the increase so occasioned cannot be recovered from the person who first violated his contract or duty and in some cases it is incumbent on the person damnified to take such active measures as he reasonably may to minimize the damages naturally flowing from the breach. (*Hamilton v. McPherson*, 28 N. Y. 72; *Johnson v. Meeker*, 96 id. 93-97; 1 *Suth. Dam.* 148; 1 *Sedg. Dam.* [7th ed.] 56; *May. Dam.* 86.)

These rules are not questioned by the learned counsel for the plaintiff nor does he deny that the damages recovered were the natural, direct and immediate result of the failure of Ogden, Calder & Co. to sell the shares on the fifteenth of August as directed and of their assignee's permitting them to be sold in October following but he contends that the defendant was not entitled to this measure of damages because when he learned on the twenty-eighth day of August that his instructions to sell had not been executed, he did not notify Ogden, Calder & Co. that he abandoned all claim to the shares and held them respon-

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sible for their value, and cites as authority for his position *Whelan v. Lynch* (65 Barb. 326; 60 N. Y. 469).

In the case cited the plaintiff consigned wool to the defendant for sale, and on the 26th of October, 1864, directed its sale at the market rate which instruction the defendant disregarded, and on the twenty-fourth of April following the plaintiff gave the defendant this notice: "In as much as you failed to sell my wool when you received orders to do so, you can do with it as you please; I withdraw from the matter and look to you."

In April, 1867, an action was begun to recover the value of the wool (it not having then been sold) and it was held that its market-price when the order to sell was given or in a reasonable time thereafter for effecting a sale was the measure of damages. In that case the plaintiff sought to recover the full value of the wool, the title to which was originally in him, and not the difference between the price on the different dates.

In the case at bar the defendant never held the legal title to this stock, and there was no way in which he could sell it, except through his brokers, without paying its purchase-price, taking the certificates and then selling them, which he was under no obligation to do for the protection of his defaulting agents. The shares were held by Work, Strong & Co. as security for any indebtedness of Ogden, Calder & Co. to them, and the latter firm had the legal right to sell the shares at any time after August fifteenth, and before the former firm exercised their right to sell them for their own security. Had the defendant's agents exercised their right they would have avoided the loss occasioned by the further decline. This is not a case of the failure of an agent to obey a direction to sell shares or chattels, the legal title to which is then, and, after notice of the agent's neglect to sell, remains in the principal, in which case the latter should either sell the property within a reasonable time or permit his agent to sell so as to render the loss as slight as possible.

The learned referee adopted the correct rule of damages. It appears from the plaintiff's bill of particulars and from the evidence that October 1, 1887, the defendant was credited

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by Ogden, Calder & Co. with \$750 dividends received on five hundred Manhattan shares, three-fifths of which (\$450), it is said by counsel, arose from the shares in dispute, and it is urged that if the plaintiff is chargeable with the shares at \$111 each as of August 16, 1887, he is entitled to all dividends thereafter declared. This is quite apparent, but the difficulty of correcting the supposed error in this court is in the rule which forbids it to look into the evidence for errors or reasons (not pointed out by a request or an exception) for modifying or reversing a judgment, and the referee not having found that this credit arose in part from a dividend on the disputed shares, and not having been asked so to find, the alleged error, if any there be, cannot be here corrected. For the same reason we cannot modify the judgment by allowing the plaintiff \$56.25, which he asserts should be allowed him as the usual commissions for selling the shares if he is to be charged with their value.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

EDWARD HAUSELT et al., as Executors, etc., Respondents, v.
ELIZABETH PATTERSON et al., Impleaded, etc., Appellants.

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145 65

It seems that while a mortgage creditor has the right to seek payment of his debt from the personal estate of the deceased mortgagor, a court of equity will not permit him to do so in the first instance to the prejudice of other creditors, but he will be required to resort to the land covered by the mortgage, and will only be permitted to seek payment of the deficiency from the personalty.

The provision of the Revised Statutes (1 R. S. 749, § 4) requiring a devisee or heir to satisfy, out of his own property, a mortgage executed by his testator or ancestor upon real estate which has passed or descended to him, unless there is an express testamentary direction that such mortgage shall be otherwise paid, does not contemplate that the devisee or heir should be so liable irrespective of the property which descended to him, but rather that his liability to pay the mortgage should be measured by and not exceed the value of that property.

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The remedy of the mortgage creditor is not confined to the mortgaged premises; it was designed to make the realty primarily chargeable with the mortgage debt, and when, with the mortgaged premises, the heir inherited other lands of the same ancestor, that he should take them all *cum onere* the mortgage debt.

It was not intended, however, to give such creditor a preference over other creditors in respect to the real estate not covered by the mortgage when there is a deficiency of the personalty to pay the other debts. The only substantial advantage the mortgage creditor has over other creditors in respect to the lands not covered by the mortgage is that his right of action is not dependent upon a sufficiency of personal assets.

The preference of the mortgage creditor in the mortgaged premises is only available to him by foreclosure.

In an action under the statute to enforce the liability of the heirs or devisees they may allege in their answer and prove other debts of the decedent unsatisfied belonging to the same or prior class as that in suit, and properly chargeable against the land by reason of a deficiency of personalty. (2 R. S. 453, §§ 39, 40; Code, § 1856.)

The amount of the recovery in such an action must be in proportion to the value of the real estate which has descended to the defendants respectively; it is only when they have transferred the land that they are personally liable, and then only for an amount not exceeding its value.

When the land has not been aliened by the heirs or devisees the remedy is by action in equity having the nature of a proceeding *in rem* to reach the land. (2 R. S. 454, § 47; Code Civ. Pro. § 1852.)

The liability of the defendants is not joint, nor is the estate which has descended to any one of them subject to the proportion of the mortgage debt chargeable to any of the others.

In an action against all the heirs or their representatives, except one, of McC., who died intestate as to his real estate, to recover a deficiency arising on foreclosure of a mortgage upon land of which he died seized, it appeared that one-sixth of the real estate descended to the heir not a party, and that such interest was not represented by any defendant. A joint judgment against the defendants for the amount of the deficiency was rendered, neither the amount of the recovery nor the costs being apportioned; the judgment did not direct that its amount be levied upon the land which descended to the heirs. *Held*, error; that the defendants were chargeable only with five-sixths of plaintiff's claim, and for that amount only their interest in the real estate was subject to the levy of execution on the judgment; that the omission to plead the defect of parties defendant was a waiver merely of that defense, and did not increase the defendants' liability. Judgment, therefore, modified so as to charge the defendants with five-sixths of the amount of the recovery, and to direct the levy of it, duly apportioned upon the real estate which descended to defendants.

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Interest had been paid by McC. upon his bond accompanying the mortgage within twenty years prior to the commencement of the action. *Held*, that although the remedy was given by statute, the cause of action was founded upon the obligation of defendants' ancestor; and so, it was not barred by the Statute of Limitations.

McC. by his will devised his real estate. By the judgment in an action brought by one of the heirs for the partition of said real estate the devise was adjudged to be void. Plaintiffs' testator brought an action against McC.'s executors, the defendants here and others, to vacate said judgment, and for direction that the executors sell sufficient of the real estate to pay his debt. Upon demurrer the complaint therein was dismissed. *Held*, that this did not sustain the defense of a former adjudication.

Defendant S. was sued as surviving trustee under the will of J., one of the heirs, who died in the state of New Jersey; her will was admitted to probate in that state; it was recorded in the office of the surrogate of New York city and county, but not formally admitted to probate in this state. By said will J. devised to S. and G., as trustees, her real estate in this state in trust, giving the survivor power to execute the trust. *Held*, that in respect to the land, the trustee was subject to the equitable jurisdiction of the courts of this state; and so, was properly made a party; and that a refusal to dismiss the complaint as to him was not error.

(Argued January 26, 1891; decided March 3, 1891.)

APPEAL, by defendants Elizabeth Patterson, Catharine Bonner and Preston Stevenson, as trustees, etc., from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 18, 1889, which affirmed a judgment in favor of plaintiffs' testator entered upon a decision of the court on trial at Special Term.

The action was brought to recover the amount of the deficiency of a mortgage debt of John H. McCunn, who died in July, 1872, leaving a will, by which he devised all his real estate to trustees.

He left surviving as his heirs at law, capable of inheriting real estate, his sister, of half blood, Jane McCunn, afterwards McDonald, and three nieces, Elizabeth Patterson, Catharine Bonner and Martha Hettrick. In April, 1873, Mrs. Patterson brought an action for partition of the land of which McCunn died seized, founded upon the alleged invalidity of the devise

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of his real estate, and the action resulted in the determination that such devise was void, but no partition or sale was made pursuant to the judgment, which was entered November 1, 1881, *nunc pro tunc* as of January 25, 1878. McCunn died seized of several parcels of land, one of which was a certain lot bounded on Twenty-third street in the city of New York, upon which he, in December, 1854, made a mortgage to the City Fire Insurance Company to secure the payment, one year thereafter, of the sum of \$5,000 according to the condition of a bond, also made by him to such company. He paid no part of the principal sum, but did pay the interest up to February 1, 1872. In March, 1874, the insurance company, in an action brought for that purpose, recovered a judgment of foreclosure and sale of the mortgaged premises. And in October, 1876, the plaintiff's testator, becoming owner by assignment to him of such judgment, afterwards caused the premises to be sold pursuant to it. The proceeds of the sale furnished nothing to apply upon the mortgaged debt, and in November, 1881, judgment for deficiency was entered amounting to \$7,606.54 and interest from January 1, 1879, against the executors of the will of the decedent. About the time of the commencement by Mrs. Patterson of her action before mentioned, the heirs of McCunn, severally, conveyed certain portions of their interests in the land to Christopher Finn amounting together to forty-four-one-hundred-and-twentieths parts of such lands. And before the commencement of this action Mrs. Hettrick died intestate leaving her surviving five children; and Jane McDonald died leaving a will, by which she devised her real estate to two trustees with the right of succession to the survivor of them. The defendant Stevenson is such surviving trustee. This action was commenced in 1885 against the present defendants and the children of Mrs. Hettrick, deceased. The first trial resulted in a judgment of dismissal of the complaint, which judgment was by the General Term reversed as to the appellants and affirmed as to the other defendants. (51 Hun, 321.) The last trial resulted in a judgment in favor of the plaintiffs' testator for the amount of the deficiency in the foreclosure action.

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Preston Stevenson for appellants. The heir takes the mortgaged real estate *cum onere* by virtue of this statute, but he is not, therefore, made personally liable to pay the mortgage debt, nor is any right of personal action against him conferred upon the creditor. The latter is not affected in any way in his remedies. He can foreclose and sell and then look to the administrator for any deficiency, or he can proceed to prove and recover his claim upon the bond from the personalty in the hands of the administrator, and the latter will be subrogated to his rights against the heir to the extent of the value of the mortgaged premises, *i. e.*, he can hold the property for all that it will pay of the mortgage debt. (1 R. S. 749, § 4; 3 R. S. [2d ed.] 600; 4 Kent's Comm. 420; *Wright v. Holbrook*, 32 N. Y. 587; *Halsey v. Reed*, 9 Paige, 452-454; *Johnson v. Corbitt*, 11 id. 269, 270; *Erwin v. Loper*, 43 N. Y. 525; *Roosevelt v. Carpenter*, 28 Barb. 426; *Rice v. Harbeson*, 2 T. & C. 4; *Mosley v. Marshall*, 27 Barb. 45; *Howell v. Price*, 1 P. Wms. 291; *King v. King*, 3 id. 358; *Galton v. Hancock*, 2 Atk. 431, 432; *Walker v. Jackson*, Id. 625; *Ankaster v. Mayer*, 1 Bro. Ch. 454; *Phillips v. Phillips*, 2 id. 273; *Woods v. Huntingford*, 3 Ves. 128, 130, 131; *Waring v. Ward*, 5 id. 670; 7 id. 332; *Cumberland v. Codrington*, 3 Johns. Ch. 257; 4 Kent's Comm. 420; 1 R. S. 316, chap. 93; *Mollan v. Griffith*, 3 Paige, 402; 1 R. S. 749, § 4; *Selover v. Coe*, 63 N. Y. 438; Code Civ. Pro. §§ 1843, 1844, 1845, 2749, 2750; 2 R. S. 109, § 53; *Hyde v. Tanner*, 1 Barb. 79, 80; *Roe v. Sweezy*, 10 id. 249.) Plaintiff's rights are barred by the Statute of Limitations. (*Church v. Olendorf*, 49 Hun, 438; *Sandford v. Sandford*, 62 N. Y. 553; *Butler v. Johnson*, 111 id. 204; *Moers v. White*, 6 Johns. Ch. 371; *Sharpe v. Freeman*, 45 N. Y. 802; Code Civ. Pro. § 382.) It was not competent, under the established rules of procedure in our courts, to grant the judgment which has been granted in this action against the defendants. (*Haywood v. City of Buffalo*, 14 N. Y. 540; *Mann v. Fairchild*, 2 Keyes, 111; *Bradley v. Aldrich*, 40 N. Y. 504; *Wheelock v. Lee*, 74 id. 500; *Stevens v. Mayor, etc.*,

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84 id. 305; Code Civ. Pro. § 1207.) The defendant Stephenson submits in his own behalf that the decision of the General Term upon which the judgment is based expressly exempts him from any liability to the plaintiff under the statute invoked as a ground of action; and that the complaint should have been dismissed as to him upon the second trial. (*Gere v. Clark*, 8 Hill, 350; *Butts v. Genung*, 5 Paige, 254; *Schermerhorn v. Barhydt*, 9 id. 45; *Wambaugh v. Gates*, 11 id. 515; *Mersereau v. Ryerss*, 3 N. Y. 262; *Stuart v. Kissam*, 11 Barb. 282; *Dodge v. Stevens*, 94 N. Y. 216; *Gray v. Ryle*, 18 J. & S. 198; *Field v. Gibson*, 56 How. Pr. 232; *Murphy v. Hall*, 38 Hun, 528.) Plaintiff is estopped from recovering by reason of the final adjudication of the same issues against him in a previous action. (*Wheeler v. Ruckman*, 51 N. Y. 391; *Blanchard v. Dias*, 3 Den. 238; *Alley v. Mott*, 111 U. S. 472; *Scharf v. Levy*, 112 id. 711; *Pray v. Hegeman*, 98 N. Y. 357.)

Lewis Sanders for respondents. The whole land which descended to the heirs, is the primary fund for the payment of the mortgage debt of the ancestor. (*Rice v. Henderson*, 2 T. & C. 89; *Roosevelt v. Carpenter*, 28 Barb. 430; *Halsey v. Reed*, 9 Paige, 455; 2 R. S. 472, § 32; *Brown v. Knapp*, 79 N. Y. 143; Cooley's Const. Lim. [2d ed.] 223; Code Civ. Pro. § 1859; 3 R. S. [6th ed.] 736, § 35.) The court has jurisdiction over the executor and trustee of Jane McDonald. (*Harkness v. Hyde*, 98 U. S. 476; *Olcott v. McLean*, 73 N. Y. 225; *Ogden v. V. Bank*, 63 id. 180, 181; *Shields v. Thomas*, 18 How. [U. S.] 259; *Toland v. Sprague*, 12 Pet. 231; *Jones v. Andrews*, 10 Wall. 332; *Creighton v. Kerr*, 20 id. 12; *Judson v. Gibbins*, 5 Wend. 227; *Dunning v. O. N. Bank*, 61 N. Y. 501; *Peterson v. C. Bank*, 32 id. 2; Code Civ. Pro. § 2703; *In re Waite*, 99 N. Y. 488; *Peterson v. Lyman*, 20 id. 103; *Gulick v. Gulick*, 33 Barb. 92; *McNamara v. Dwyer*, 7 Paige, 239; *In re Webb*, 11 Hun, 125.) The Statute of Limitations is not a bar. (3 R. S. [6th ed.] 736, § 32; Code Civ. Pro. §§ 406, 1628,

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1843; 4 Kent's Comm. 420.) A personal judgment was proper. (3 R. S. [6th ed.] 736, 737; Code Civ. Pro. § 1854.) While the Code requires an apportionment of the judgment among the several heirs according to the value of their respective interests, no objection was made to the form of the judgment which was filed on the usual notice and no motion was made to correct it and no objection was taken thereto at the General Term. It is too late to raise the question in this court for the first time, there being no exception which raises the question. (*DeLavallette v. Wendt*, 75 N. Y. 579; *Campbell v. Stevenson*, 63 id. 586.) If, notwithstanding the statute declaring the direct liability of the heir, circumlocution still obtains, appellants must fail. (*Shayer v. Marsh*, 75 N. Y. 342; *DeLavallette v. Wendt*, Id. 579; *Benisse v. Wood*, 37 id. 532; *Mallory v. T. Ins. Co.*, 47 id. 54; *Vanderlip v. Keyser*, 68 id. 444.)

BRADLEY, J. Inasmuch as the descent on which this action is founded was cast upon the heirs of John H. McCunn prior to the repeal by L. 1880, ch. 245 of art. 2 of tit. 3, ch. 8, part 3 of the Revised Statutes, the inquiry is suggested by counsel whether the provisions of the latter were for the purposes of the remedy still operative. (Code, § 3352.) That, however, is a matter of no importance in this case, as those provisions of the Revised Statutes, so far as applicable to it, and the substituted provisions of the Code of Civil Procedure, are substantially the same. The right to maintain this action is dependent upon the construction and effect of the statute which provides that "whenever any real estate, subject to a mortgage executed by any ancestor or testator, shall descend to an heir or pass to a devisee, such heir or devisee shall satisfy and discharge such mortgage out of his own property, without resorting to the executor or administrator of his ancestor, unless there be an express direction in the will of such testator that such mortgage be otherwise paid." (1. R. S. 749, § 4.) Prior to this statute the personalty was the primary fund for the payment of mortgage debts as well as others of the ancestor.

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And at common law the heir was not chargeable with simple contract debts of such decedent; nor was he, unless mentioned in the bond of the ancestor, liable for debts by specialty of the latter, and when so named, his liability was to the extent only of the land which descended to him. This liability of the heir was in this state at first extended so as to embrace simple contract debts as well as specialties, whether the heir was mentioned in them or not; and for the purpose of charging him by means of action at law, a system of practice was provided by statute. (L. 1786, ch. 27, 1 R. L. 316.) That was superseded by the Revised Statutes which furnished provisions for suits by and against legatees and against next of kin and heirs and devisees and between heirs and devisees. (2 R. S. 450.) Under those provisions the liabilities of heirs and devisees are secondary and dependent upon the insufficiency of the personal estate of the decedent. The only exception to the primary charge of the debts upon the personalty was in the provisions of section 4 of the Revised Statutes before mentioned. And that did not in terms charge the heir with personal liability, nor was it contemplated by the statute that he should be so liable, irrespective of the property which descended to him, but rather that his liability to pay the mortgage out of his own property should be measured by and not exceed that which descended to him from his ancestor. The evident purpose of the revisers was, in the case provided for, to make the land the primary fund for the payment of the mortgage debt. (3 R. S. [2d ed.] 600.) And to give it practical effect that section and the other provisions of the statute on the subject, so far as applicable, are in *pari materia*. In that view the remedy is by action in equity having the nature of a proceeding *in rem* in such sense that when the land has not been aliened by the heir the execution of the judgment shall be had by levy upon the real estate descended to him. (2 R. S. 454, § 47; Code, § 1852; *Butts v. Genung*, 5 Paige, 259; *Schermerhorn v. Barhydt*, 9 id. 28; *Wood v. Wood*, 26 Barb. 356.) And to hold that the remedy is confined to the mortgaged premises, would

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not give effect to the apparent purpose of the statute as represented by its terms. Such limitation is not consistent with its provisions that the heir shall satisfy and discharge the mortgage out of his own property. Nor is it reasonable to suppose that the statute was intended to create a personal liability of the heir for the amount of the mortgage debt, but as we construe the statute its design was to make so far as practicable, the realty primarily chargeable with the payment of a debt of the decedent secured by mortgage on his land, and that when with the mortgaged premises the heir inherited other lands of the same ancestor he should take them altogether *cum onere* the mortgage debt, assuming that there was a personal liability of the decedent to pay it at the time of his decease. (*Roosevelt v. Carpenter*, 28 Barb. 426.) This, however, was not intended to give such creditor a preference over other creditors of the decedent in the proceeds of the lands not covered by the mortgage when there is a deficiency of the personal estate to pay them. (2 R. S. 453, §§ 39, 40; Code, § 1856.) The preference of the mortgage creditor in the mortgaged premises is only available to him by foreclosure of his mortgage and not by action under the statute. And in such action the heir may allege in his answer and prove that there are other debts of the decedent unsatisfied belonging to the same or prior class of that on which the action is founded and properly chargeable against the land by reason of deficiency of personalty. (*Schermerhorn v. Barhydt*, 9 Paige, 45.) The statute provides that the action be brought against all the heirs jointly (L. 1837, ch. 460, § 73; Code, § 1846); that the amount which the plaintiff is entitled to recover shall be apportioned among them in proportion to the value of the real estate descended to the heirs respectively; and that the costs recovered shall in like manner be apportioned among them. (2 R. S. 455, §§ 52, 53; Code, § 1847.) In the view thus taken the only substantial advantage of the mortgage creditor over other creditors in respect to land inherited by the heirs, other than that covered by his mortgage, is in the fact that his right of action is not dependent upon a deficiency

of personal assets of the decedent. Nothing in that respect arises in this case, nor is there any question having relation to any other creditors.

It appears by the former adjudication, to that effect, that McCunn died intestate as to his real estate, and none of it seems to have been aliened by the heirs except about one undivided third part of it to Mr. Finn. There is no question about its sufficiency in value to pay the amount of the plaintiffs' claim represented by the judgment for deficiency in the foreclosure action in favor of their testator. The amount was not, nor were the costs recovered in this action apportioned among the defendants, nor did the judgment direct that its amount be levied of the land which descended to the heirs. These are statutory requirements. (2 R. S. 454, § 47; Code, § 1852.) And it is with a view to such judgment and its execution that it is made essential for the complaint to contain a description of the land. (Id. § 44; Id. § 1851.) It is only when the land has been aliened by the heirs that they are personally liable for an amount not exceeding its value. (Id. § 49; Id. § 1854.) The form of the judgment in this case is not very important, provided the execution upon it be levied upon the undivided real estate which descended to them for the amount only, with which the defendants are chargeable. But as one-sixth part of the estate which Mrs. Hettrick, one of the heirs of McCunn, inherited is not represented by any party defendant, that share is not subject to levy of execution upon the judgment. (*Schermerhorn v. Barhydt*, *supra*.) The defendants Patterson and Bonner and the testatrix of Stevenson took by descent five-sixth, of the real estate, and they are chargeable with only that proportion of the plaintiffs' claim, and for that amount only the property of the defendants is subject to the levy of such execution. The views here given have relation to the liability of the heirs in the case mentioned, and have no reference to other remedies of the mortgage creditor or to any question relating to the right of executors or administrators to subrogation in case he collects the deficiency of his mortgage debt from the personalty, in the event there remains realty

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which descended to the heirs. While the statute does not deny to a mortgage creditor the right to seek payment of his debt from the personal estate of the decedent, the court of equity will not permit him to do so in the first instance to the prejudice of other creditors, but he will be required to resort to the land covered by the mortgage, which in view of the statute is the primary fund, for that purpose, and it is only for deficiency that he will be permitted in such case to seek payment from the personalty. (*Johnson v. Corbett*, 11 Paige, 265.) The deficiency referred to is that remaining unpaid of the debt after the application in due course, of the proceeds of the premises upon which the mortgage to secure it was a lien. The other real estate which descended to the heirs subject to the remedy before mentioned by action is not dependent upon any lien, but upon the statutory liability of the heirs.

The contention that a recovery was barred by the Statute of Limitations is not sustained. Although the remedy is given by the statute, the cause of action is founded upon an obligation of the ancestor of the defendants to pay the sum secured by the mortgage represented by his bond. And the Statute of Limitations is no more available to the heirs than it would have been to McCunn if he had been living. The interest was paid by him upon it in 1872, and this action was commenced within twenty years thereafter. It is unnecessary to consider the question, in the view taken by counsel, on the assumption that the recovery was treated as in an action of law, since the action must be regarded as one equitable in character.

Nor is there any support for the alleged defense of a former adjudication founded upon the fact that an action had been brought by the plaintiffs' testator against McCunn's executors, these defendants and others to vacate the judgment determining the invalidity of the devise in the will, and for direction that the executors sell sufficient of the real estate to pay his debt and for such further relief as the court should see fit to grant, and that upon demurrer to it the complaint was dismissed. That action in its nature and purpose was distinct from the present one; and while the complaint there embraced

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many of the facts essentially in that of the present action, the issues tendered by the former as well as the relief in view, were quite unlike those represented by the complaint in this action.

A further question is raised as to the right of the plaintiffs to maintain the action against the defendant Stevenson, who is sued as surviving trustee of the will of Jane McDonald. She, at the time of her death, was a resident of the state of New Jersey. By her will, which was admitted to probate in that state, she appointed Stevenson and one Lozier executors and trustees, and devised to them all of her real estate in the state of New York in trust for certain specified purposes, and gave the survivor of them power to execute the trust. Letters testamentary were issued to them in the state of New Jersey, and the will was recorded in the office of the surrogate of the city and county of New York, but never was formally admitted to probate in this state. The defendant Stevenson is the surviving trustee, and as such has proceeded in the execution of the trust. It is unnecessary to consider the question in the aspect which it would be presented if this were an action at law to charge him with personal liability. His right to take the land with the power to control and dispose of it in execution of the trust was given by the will, and in respect to it the trustee is subject to the equitable jurisdiction of the courts of the state within which the land is situated, and such jurisdiction will be exercised by the court in behalf of creditors within the state.

The denial of the motion to dismiss the complaint as to the defendant Stevenson, therefore, was not error.

The liability of the heirs to pay the mortgage out of their property is proportionate with the real estate inherited by them respectively. And although no question arising out of the non-joinder of any representative of the estate which descended to Mrs. Hettrick, is raised by the answer or otherwise, the defendants are not liable to pay out of their property any amount greater than that with which they are charged by the statute. The omission to plead the defect of parties defendant

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was a waiver merely of that defense to the action, without increasing the extent of the liability of the defendants, or the amount which the plaintiffs would otherwise be entitled to recover against them respectively. It may be observed that the liability of the heirs to pay out of their property is not joint, nor is the estate which descended to any one of them subject to the proportion of the mortgage debt chargeable to any other of the heirs. The portion which descended to Jane McDonald was one-half, and to each of the defendants, Patterson and Bonner, one-sixth. And inasmuch as the recovery in the court below was for the full amount of the mortgage debt, and the defendants represented only five-sixths of the estate, which descended to the heirs, the judgment should be so modified as to charge the defendants with only five-sixths of the amount of such recovery, and direct the levy of it (duly apportioned) of the real estate which descended to Jane McDonald and the defendants, Patterson and Bonner, and, as so modified, affirmed without costs in this court to any party.

All concur, HAIGHT, J., in result, except FOLLETT, Ch. J., dissenting.

Judgment accordingly.

In the Matter of the Judicial Settlement of the Accounts of
GEORGE A. POWERS, as Executor, etc.

To render a provision in a will effectual to furnish a greater security than that given by law for the payment of debts in due course of administration, by charging them upon the real estate of the testator, the purpose must quite clearly appear; a mere direction to pay debts out of the property will not suffice.

Under the act of 1837, concerning executors and administrators (§ 37, chap. 460, Laws of 1837), as amended in 1868 (Chap. 594, Laws of 1868), and under the Code of Civil Procedure, the running of the Statute of Limitations against a debt due an executor or administrator from, or any cause of action in his favor against, the decedent, is suspended from the time of the death of the latter until the first judicial settlement of the accounts of the executor or administrator; and this, without regard to the number of years embraced in that period.

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Where, therefore, fourteen years elapsed between the death of the decedent and the first judicial settlement of an executor's accounts, *held*, that debts due him from the decedent, which were not barred by the statute at the time of the death of the latter, were properly allowed the executor. The will of M. devised to her executor one-third of her residuary estate in trust, to receive the rents and income and apply the net proceeds to the use of a beneficiary named during life, and, on the death of the beneficiary, gave the property to her children; each of the other two-thirds was disposed of in a similar manner. The testatrix authorized her executor, at any time before final division and settlement of her estate, whenever he should deem proper for any "purpose which in his discretion may render it advisable so to do," to sell any part or portion thereof. The executor sold certain of the residuary real estate. Upon settlement of his accounts, certain claims presented by him against the estate were proved and allowed, and after applying the proceeds in his hands of the residuary personal estate, there remained a balance due him. *Held*, that the proceeds of the sales of the real estate were properly treated as assets in his hands, applicable to the payment *pro tanto* of his claims.

In re McComb (117 N. Y. 378), distinguished.

(Argued February 2, 1891; decided March 3, 1891.)

APPEAL by Mary L. O'Flynn, a beneficiary under the will of Sarah Macomber, deceased, from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 24, 1890, which affirmed a decree of the Surrogate's Court, settling the accounts of the executor of said will.

The material facts are stated in the opinion.

Wm. J. Gaynor for appellant. If the power of sale contained in the will be held broad enough to permit the sale of real estate by the executor to pay debts in default of insufficient personalty for that purpose, yet the said power was not exercised for that purpose in the conveyance of the four parcels for the aggregate sum of \$10,850, because there was no lack of personalty, and, therefore, the said real estate was sold in the management and for the better preservation of the trust estates, and consequently the said sum of \$10,850 belongs to the said trust estates, and the executor should be required to turn it over to the trust accounts. (*In re Van Dyke*, 44 Hun,

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394; Code Civ. Pro. § 2739; *In re Fox*, 52 N. Y. 530; *Greenland v. Waddell*, 116 id. 234; *Cooke v. Platt*, 98 id. 35; *Hood v. Hood*, 85 id. 561; *In re Tilden*, 98 id. 434; *Hickey v. Taafe*, 99 id. 204; Code Civ. Pro. §§ 2724, 2740, 2749, 2759; *In re McComb*, 117 N. Y. 378; *In re City of Rochester*, 110 id. 159; *Clift v. Moses*, 116 id. 144; *Smith v. Soper*, 32 Hun, 46; *Platt v. Platt*, 105 N. Y. 488; *Dodge v. Stevens*, 94 id. 209-216; *Sharpe v. Freeman*, 45 id. 802.) The executor should not have been allowed to prove his claims, as they were barred by the Statute of Limitations, not having been presented and proved within the time limited by law, and they were excepted to and resisted on that ground. (*In re Van Dyke*, 44 Hun, 394; Code Civ. Pro. §§ 2724, 2740.) The term "judicial settlement," as used in the Code of Civil Procedure, can only mean a judicial settlement which the executor or administrator can be required to make by those interested, or which he can make to get an adjudication against them. (Code Civ. Pro. § 2514.)

Edward E. Sprague for respondent. The executor's claims against the estate were fully established by the evidence. (*Lerche v. Brasher*, 104 N. Y. 157.) The claims of the executor are not barred by the Statute of Limitations. (Laws of 1837, chap. 460, §§ 33, 37; Laws of 1868, chap. 594; Code Civ. Pro. §§ 2739, 2740; *Campbell v. Purdy*, 5 Redf. 434; *In re Wood*, 5 Dem. 345.) The proceeds of sales of real estate are applicable to payment of debts. (Code Civ. Pro. § 3343; Penal Code, § 718; *People v. N. Y. & M. B. R. Co.*, 84 N. Y. 565; *Jackson v. Honsel*, 17 Johns. 281; *Lawrence v. Lawrence*, 1 Edw. 241; *Lupton v. Lupton*, 2 Johns. Ch. 614; *White v. Kane*, 19 J. & S. 295; *In re Fox*, 52 N. Y. 506; *Wood v. Wood*, 26 Barb. 366; *Smith v. Soper*, 32 Hun, 46; *Smith v. Comp*, 5 Dem. 251; *Taylor v. Dodd*, 58 N. Y. 335; *Hoyt v. Hoyt*, 85 id. 142; *Reynolds v. Reynolds*, 16 id. 259; Code Civ. Pro. § 2724; Laws of 1837, chap. 460; *Erwin v. Loper*, 43 N. Y. 521; *Glacius v. Fogel*, 88 id. 434; *Clark v. Clark*, 8 Paige, 152; *Bloodgood v. Bruen*, 2 Bradf.

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8; *Stagg v. Jackson*, 1 N. Y. 206; *White v. Howard*, 46 id. 162.)

BRADLEY, J. The testatrix died April 5, 1873. Her will was admitted to probate and letters testamentary issued to George A. Powers April 10, 1873. His petition for judicial settlement of his accounts was presented to the surrogate September 29, 1887, and until then he had filed no account. The referee, by his report, which was confirmed by the surrogate's decree, in stating the account charged the executor with \$119,618.69, and allowed to his credit \$62,773.43, leaving a balance in his hands of \$56,845.26 subject to reduction by his commissions, and the costs and expenses of the accounting. And the referee found that at the time of the death of testatrix she was indebted to the executor for moneys loaned to and expended for her by him to the amount of \$37,636.66, the interest on which to the date of the report was \$43,341.46; and that on December 11, 1872, the testatrix made to the executor her promissory note for \$25,000, which remained unpaid, and that the interest upon it amounted to \$27,722.20. And the referee further found that the executor was entitled to retain and apply in part payment of his claims the balance before mentioned remaining in his hands after payment of his commissions and the expenses of the accounting. The main questions arising upon the contestant's exceptions to the referee's report and to the decree of the surrogate are: (1) Whether the executor's claim was established; (2) Whether it was barred by the Statute of Limitations; (3) Whether he was entitled to application upon his claim of the proceeds, with which he was charged, of the sale of certain real estate by him. The testatrix owned considerable real estate in the city of Brooklyn, and in 1868 she, by power of attorney to Powers, vested him with powers quite plenary for its control and management, and to transact business for her and in her name, and his account with her was annually stated and certified by them in writing. The last statement subscribed by them May 1, 1872, was that all accounts having been examined, approved,

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passed and settled, they released each other from all further examination of them, and there remained a "balance in favor of George A. Powers of thirty-seven thousand six hundred and thirty-three, sixty-six-one-hundredths (\$37,633.66) dollars, which is carried to the new account commencing May 1, 1872, and is to draw interest from date." This established the balance due Powers at that date, and there is no evidence of the situation of the accounts between those parties thereafter during the life of the testatrix other than what appeared in his account filed with the surrogate, which charged him with a balance in his hands arising out of the transactions of that period of \$9,052.25. This he sought in his account to apply by way of reduction of the balance of May 1, 1872, but upon the objection of the contestant it was not so deducted, but treated as assets in the hands of the executor. It does not appear that he refused to produce the account kept by him after that date, or to render it available to the contestant as evidence. The balance of the account so adopted by those parties in view of the rendition by the executor of what purported to be a statement of the subsequent account justified the conclusion of the referee on the subject. (*Lerche v. Brasher*, 104 N. Y. 157.) And the presumption which otherwise may have arisen that the note before mentioned was made and taken in settlement of the accounts between those parties, the referee was permitted to find was repelled by evidence to the effect that the note was given for services rendered by the payee for the maker.

It is urged that as fourteen years after the death of the testatrix elapsed before the claim of the executor was presented to the surrogate for proof and allowance, it was barred by the Statute of Limitations. Upon that subject the statute in force at the time of such death, provided that the Statute of Limitations should not be available as a defense to a debt or claim of an executor or administrator against the estate represented by him "provided the same shall be presented and claimed at the first accounting, and provided the same was not barred at the time of the death of the testator or intestate." (Laws

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of 1837, ch. 460, § 37, as amended by L. 1868, ch. 594.) And on the repeal of this statute in 1880, that substituted for it provided that "From the death of the decedent, until the first judicial settlement of an account of his executor or administrator, the running of the Statute of Limitations, against a debt due from the decedent to the accounting party, or any other cause of action, in favor of the latter against the decedent, is suspended. * * * After the first judicial settlement of the account of an executor or administrator, the Statute of Limitations begins again to run against a debt due to him from the decedent or any other cause of action in his favor against the decedent." (Code Civ. Pro. § 2740.) The contention that it was not within the legislative contemplation that the suspension of the Statute of Limitations should be continued beyond six years succeeding one year after the granting of tatters testamentary or of administration, has no support in the plain language of the provision above mentioned. The executor might within that time be required to account; and assuming that after that time he could not be required to do so, he may voluntarily do it thereafter as well as before; it is the first judicial settlement by him which relieves the statute from its suspension in its application to his claim as relates to the time within which he may prove and establish it in the Surrogate's Court. And such was the settlement of the executor in the proceeding founded upon his petition before mentioned. The statute was then no bar to his claim.

The further and more difficult question arises in respect to the disposition of \$10,850, the proceeds of real estate sold by the executor. And its consideration calls attention to the provisions of the will. After bequeathing all her household furniture, ornaments, clothing, pictures, plate, etc., in and about her house, the testatrix devised to the executor certain buildings and premises in the city of Brooklyn, in trust to receive the rents, profits, issues and income thereof and after paying therefrom interest of incumbrances and taxes, to apply the residue to the use of her granddaughter Sarah A. Van Zandt,

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during her life, and on her death gave the property to her children. The testatrix devised and bequeathed one-third part of the residue of her property and estate to the executor in trust to receive the rents, profits, issues and income thereof, and after paying therefrom one-third of the interest of incumbrances and taxes, to apply the residue from time to time to the use of her son Robert, during his life, and on his death she gave such one-third of the residue of her property and estate to the children of such son; and she gave and devised the other two-thirds of such residue to the executor upon a like trust to the use of another son and daughter (one-third each) during their lives, and on their deaths, respectively, gave the property to their children. And by a subsequent provision in the will she authorized and empowered the executor at any time before the final division and settlement of the estate, whenever he should think proper, either for the purpose of paying off incumbrances or of protecting her real estate or more equitably or conveniently dividing the same "or for any other purpose which in his discretion may render it advisable so to do, to sell and convey, or to mortgage any part or parts, portion or portions, share or shares" thereof, and to execute and deliver sufficient instruments for conveying or mortgaging the same. By the first clause of her will the testatrix says: "I direct that all my just debts (not secured by mortgage) and my funeral and testamentary expenses be paid by my executor out of my property, together with the legacy duties and taxes or other moneys which may be due to the United States in respect to the same, and all other taxes and assessments which may be due thereon at my death." It is urged on the part of the executor that by this provision of the will the debts of testatrix were charged upon her real estate. The mere direction for payment of the debts out of her property is in effect nothing more than a direction to pay them. In either case the purpose is indicated that they be paid out of the property of the decedent; and to render a provision in a will effectual to furnish a greater security than that given by law for the pay-

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ment of debts in due course of administration, by charging them upon the real estate of the testator, the purpose must quite clearly appear. The question in that respect as to legacies has frequently arisen, as to debts, seldom; and, although the intention to give such effect to the former must be expressly declared or clearly inferred from the language of the will (*Lupton v. Lupton*, 2 Johns. Ch. 614), the courts may resort to extraneous circumstances bearing upon the intention of the testator in aid of construction (*Hoyt v. Hoyt*, 85 N. Y. 142), and may not overlook the relation of the beneficiaries of the will to the testator. (*Scott v. Stebbins*, 91 N. Y. 605; *McCorn v. McCorn*, 100 id. 511; *Briggs v. Carroll*, 117 id. 288.) In fact, to support such charge of legacies, the search for the intention of the testator is quite liberally extended, and properly so, as it is generally his purpose that they be paid, and in default of personalty the legatee is otherwise remediless. The debts are by law a charge upon the realty for three years from the granting of letters; and thereafter in case of deficiency of personal estate, the creditors have their remedy against the heirs and devisees to the extent in value of the real estate descended or devised to them. Those facts evidently may qualify or limit the application of some of the inferences, especially from extraneous circumstances, which may properly be considered in aid of interpretation in respect to legacies. (*In re City of Rochester*, 110 N. Y. 159; *Clift v. Moses*, 116 id. 144.)

Assuming that it was within the contemplation of the testatrix that if deemed by him necessary to do so, the executor might exercise the power of sale for the payment of debts, that would not have the effect to make the debts a lien upon the real estate, but rather that the proceeds of realty produced by sale for that purpose would be assets in his hands applicable to payment of them. Such would be the result of the exercise of a general power of sale. (*Erwin v. Loper*, 43 N. Y. 521; *Glacius v. Fogel*, 88 id. 434.) The power was given to the executor to sell for any purpose which in his discretion should render it desirable to do so. This placed it within his power

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to make sale when in his judgment it was required to pay debts, taxes or other expenses within his trusts, and to the extent by him deemed necessary for such purpose, subject, however, to the qualification that some permissible occasion existed for the exercise of his discretion in that respect. The doctrine of the *McComb* case (117 N. Y. 378) is not applicable. There the discretionary power of sale given to the executors was to be exercised only for the benefit of the devisees and subject to the direction to apply the proceeds to their use; and it was held that it could not be converted into a power to sell to pay debts. The executor in the present case could not retain any of the property of the decedent in satisfaction of his claims until they were proved before the surrogate. (2 R. S. 88, § 33.) And they were subject to proof and contest upon a judicial settlement of his account, as was any other claim against the estate. (Code Civ. Pro. § 2739.) His debt not having been proved at the time of the sale of real estate the sale cannot be treated as made to pay it. By reference to the state of the executor's accounts during and until the end of the year 1874, it appears to have been such as to permit him to deem it advisable to make the sale of real estate, made by him in that year. During that time his disbursements as executor and trustee, exclusive of the proceeds of such sale, exceeded in amount the funds in his hands and derived from the estate within that period. It may, therefore, be assumed in view of such deficiency that the discretion exercised by him in making the sale of November, 1874, for \$8,500 was within the power conferred upon him by the will. And the balance of the proceeds of that sale may be treated as assets in his hands as executor. But there seems to have been no occasion to make, for the payment of debts or expenses, the three sales of real estate made in March, 1876, for \$1,100; July, 1879, for \$750, and May, 1883, for \$500. My view that the proceeds of those sales, amounting to \$2,350, should be treated as held by him for the benefit of the residuary devisees would lead to modification of the surrogate's decree. But as it is the opinion of my associates that, after the execu-

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tor's claims were proved and allowed, the proceeds of such sales should be treated as assets in his hands and as properly applicable to the payment *pro tanto* of his claims, the judgment must be affirmed.

All concur.

Judgment affirmed. _____

DEBORAH TAYLOR LEE et al., Appellants, v. CHARLEMAGNE TOWER, JR., et al., as Executors et al., Respondents.

One who has accepted a benefit under a will, cannot be allowed to dis-appoint it, but must concede full effect to the dispositions thereof.

The will of T., a resident of Pennsylvania, contained devises of real estate in this state in trust, which were in contravention of the statute limiting the period of suspension of the power of alienation. The will gave to the wife of the testator certain goods and chattels, a life estate in certain real estate and two-fifths of the income of his residuary estate, devised and bequeathed in trust, which included the lands in this state, which provisions were declared "to be in lieu, substitution and satisfaction of her dower, thirds and all other interest in my estate, real and personal, and mixed." The widow voluntarily elected to accept the provisions of the will. Upon a case submitted under the Code of Civil Procedure (§ 1279), *held*, that the widow by her election to take the provision made for her in the will, consented to all the terms and conditions annexed, and yielded any right inconsistent therewith; and, therefore, she was not entitled to dower, at least in the absence of any offer to surrender the benefit she had received under the will and to take what the law would allow her; that the frustration of the wishes of the testator, as to the disposition of the income from the realty in this state, did not permit the court to disappoint his expressed intentions as to dower therein.

(Argued February 3, 1891; decided March 3, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 25, 1890, in a case submitted upon an agreed statement of facts under section 1279 of the Code of Civil Procedure.

The facts, so far as material, are stated in the opinion.

Earl B. Putnam for appellants. The evident design and intention of the testator, as shown by the whole scheme of

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his will, and particularly by the directions as to immediate investment of the whole of the capital of the estate; and as to the ultimate division of the capital, in connection with the terms employed, point to the immediate conversion of the estate into money. (*Vanderpool v. Loew*, 112 N. Y. 167, 177; *Byrnes v. Stillwell*, 103 id. 453, 458; *Durour v. Motteaux*, 1 Ves. 320; *Burrell v. Baskerfield*, 11 Beav. 525; *Mower v. Orr*, 7 Hare, 473; *Affleck v. James*, 17 Sim. 121; *Wurtz v. Page*, 19 N. J. Eq. 365; *Belcher v. Belcher*, 38 id. 126; *Byrnes v. Baer*, 86 N. Y. 210; *Asche v. Asche*, 113 id. 232; *Lent v. Howard*, 89 id. 169; *Livingston v. Murray*, 39 How. Pr. 102; *Dodge v. Pond*, 23 N. Y. 69; *Van Vechten v. Van Vechten*, 8 Paige, 104; *Haxton v. Corse*, 2 Barb. Ch. 519; *Fisher v. Banta*, 66 N. Y. 468; *Power v. Cassidy*, 79 id. 602.) The testator having directed the immediate conversion of the New York lands into money, the will must be construed according to the laws of Pennsylvania, where it is valid as a will of personal property. (Pom. Eq. Juris. §§ 1159, 1164; *Hobson v. Hale*, 95 N. Y. 588; *Despard v. Churchill*, 53 id. 192, 200; *Parsons v. Lyman*, 20 id. 103; *Chamberlain v. Chamberlain*, 43 id. 424; *Vansart v. Roberts*, 3 Md. 119; 1 R. S. 734, § 96.) If the court shall declare the will invalid, so far as it affects the real estate situate within the state of New York, then the widow is entitled to dower in the New York lands. (*Chamberlain v. Chamberlain*, 43 N. Y. 424; *In re Benson*, 96 id. 499; Pom. Eq. Juris. § 484; *Howe v. Van Schaick*, 7 Paige, 221, 232; *Maxwell v. Maxwell*, 2 DeG., M. & G. 705.)

Henry T. Utley for respondents. The *lex loci rei sitae* applies and governs in the construction of all wills of real estate, while the *lex domicilii* governs in reference to wills of personal estate. (33 N. Y. 558, 561; 47 id. 389; 4 Den. 305; 46 N. Y. 144; 52 Barb. 296.) The trust provided for in the will is in contravention of the statute which provides that the absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than dur-

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ing the continuance of not more than two lives in being at the creation of the estate. (2 R. S. chap. 1, tit. 2, § 14; 3 Kent's Comm. 514; 4 id. 3, 4; *Hobson v. Hale*, 95 N. Y. 588; *Boyn-ton v. Hoyt*, 1 Den. 53; *Hawley v. James*, 16 Wend. 61; *Garvey v. McDavitt*, 72 N. Y. 556; *Amory v. Lord*, 9 id. 413.) It is claimed that by the provisions of this will it is made apparent that the testator intended the real property devised to the trustees in trust should be sold, and the proceeds of sale invested for purposes of the trust, thereby creating an equitable conversion of the same, in which case the will is gov-erned by the law of the state of Pennsylvania, and under that law is valid. Such a construction as to the intention of the testator would nullify the discretionary authority given to the trustees by the seventh item of the will to sell the real prop-erty, and thereby make a sale by them imperative. (*Asche v. Asche*, 113 N. Y. 235; *Hobson v. Hale*, 95 id. 588; *Newell v. Nichols*, 75 id. 78; *White v. Howard*, 46 id. 144; *Gourley v. Campbell*, 66 id. 169; *Harris v. Clark*, 7 id. 242; *Slocum v. Slocum*, 4 Edw. 613; *Phelps v. Pond*, 23 N. Y. 69; *Power v. Cassidy*, 79 id. 602; *Amory v. Lord*, 33 id. 419; *Lynes v. Townsend*, 33 id. 558.) If the will did not contain the pro-visions hereinbefore set forth, which are circumstances posi-tively showing that there was not an intention of the testator to convert his real into personal estate, still, there would not be any grounds for holding that there was an equitable conversion within the rules laid down by the court in the above cases, for, in the absence of those circumstances, the provisions of the will would be of such a character as to leave no question of fact that the testator did not intend the real estate should be sold in any event. (*Van Nostrand v. Moore*, 52 N. Y. 12; *Trustees, etc., v. Fitzhugh*, 27 id. 130.) The statute provides that if provision by will is made in lieu of dower, the widow must make her election (1 Stat. at Large, 693), which she has done in this case. Her acceptance of these provisions having been made in Pennsylvania and under the laws of that state, must be regarded as valid and binding upon her wherever any of the property may be situate, of which the testator died

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seized. By accepting these provisions, she assents to all the terms and conditions annexed to them, and yields every right inconsistent with such terms and conditions. (*Chamberlain v. Chamberlain*, 43 N. Y. 424, 442; *Palmer v. Voorhis*, 35 Barb. 479; *Vernon v. Vernon*, 53 N. Y. 351; *Howe v. Van Schaick*, 7 Paige, 221; *Orton v. Orton*, 3 Keyes, 486; *Caulfield v. Sullivan*, 85 N. Y. 153; *Larrabee v. Van Alstyne*, 1 Johns. 307; *Adsit v. Adsit*, 2 Johns. Ch. 448, 451.)

PARKER, J. This controversy was submitted without action pursuant to the provisions of section 1279 of the Code of Civil Procedure.

Charlemagne Tower, a resident of Pennsylvania, died leaving a last will and testament which was admitted to probate at Philadelphia, May 21, 1889, and subsequently duly recorded in the counties in this state wherein are situated the lands which occasion this contest.

The questions submitted were whether the provisions of the will, so far as they related to real estate situated in the state of New York were valid, and if invalid, whether the widow of Charlemagne Tower has a dower interest therein.

The court adjudged that the attempted disposition of such real estate was invalid because in contravention of the statutory provision that the absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of not more than two lives in being at the creation of the estate.

We agree with the conclusion reached by the learned General Term, as well as the reasoning on which it was founded. It is deemed unnecessary, therefore, to refer to the provisions of the will which fully appear in the opinion of the General Term.

That court also held that the widow is entitled to dower in the real estate situated in this state as to which it was adjudged the testator died intestate. In that view we do not concur.

The testator, after providing for the payment of debts and funeral expenses, gives to his wife absolutely his household

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goods, horses and carriages; also the occupation and use of his residence in the city of Philadelphia, during her natural life, and directs that the taxes, water rent and repairs thereon during her occupancy shall be paid out of the income of his estate. All the rest of his property he devises and bequeaths in trust and directs, among other things, that four-tenths of the income thereof shall be paid to her during the term of her natural life.

The will further provides as follows: "The provisions herein made for the benefit of my dear wife I declare to be in lieu, substitution and satisfaction of her dower, thirds, and all other interest in my estate, real, personal and mixed." And the widow has elected to accept the provisions of the will.

It may be observed that this is not an action brought to relieve the widow from the effect of her election on the ground that it was induced through mistake, she at the same time offering to surrender the benefits which the testator declared to be given in lieu of dower. It is not suggested that the widow would now prefer to take that which the law would allow her had she refused to accept the provisions of the will.

The position she assumes, and which has been sustained by the General Term, is that the testator intended that she should have two-fifths of the income of the land in question, and that as such intention has been frustrated by the statutes of this state she is entitled to dower in such land and still retain the benefit of the provisions of the will giving to her certain property absolutely, with the use of other property during life, and two-fifths of the income of that which passed to the executors in trust, notwithstanding the declaration of the testator that if accepted it must be "in lieu, substitution and satisfaction of her dower and thirds and all other interests (not in the estate disposed of by the will, but) in my estate, real, personal and mixed." Including necessarily that of which the testator died intestate as well as testate.

When the widow accepted the provision made for her she, in legal effect, consented to all the terms and conditions annexed to it, and yielded every right inconsistent therewith.

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No one can be allowed to disappoint a will under which a benefit is accepted, but on the contrary must concede full effect to the dispositions thereof. (*Chamberlain v. Chamberlain*, 43 N. Y. 424-442.) And when one is thus put to an election it matters not whether that which is taken turns out to be greater or less in value than that which is surrendered. (*Brown v. Knapp*, 79 N. Y. 136-143.)

We have then a bequest coupled with a condition and an acceptance thereof.

The condition in clear and comprehensive terms provides that the acceptance of the bequest by the legatee must be in lieu of dower. It makes no exception. It was evidently the intention of the testator that there should be none. And the court must so declare. But, it is said the testator intended that she should have two-fifths of the income of the real estate of which he died intestate. True, and that fact gives support to that which seems obvious on a mere reading of the condition, that it was the intention of the testator that the widow should not have dower in these lands. He intended, and attempted, to provide that she should have two-fifths of the income. That attempt was unsuccessful because in some respects the provision was in hostility to the statute. Effect, therefore, cannot be given to the testator's intention in that direction. But the frustration of his wishes as to the disposition of the income of this real estate, by the operation of the statute, does not permit the court to disappoint his expressed intentions in regard to dower. The miscarriage of his plans, therefore, cannot be partially remedied by an adjudication that she is entitled to dower in such lands, for the court is without power to so adjudicate. It can no more relieve the widow from a full operation of the intentions of the testator, than it can from the effect of the statute. The duty of the court in the premises is to construe the will, not to make one. It cannot correct the testator's mistakes nor piece out the equities according to the conscience of the court. The testator having, contrary to his intention, died intestate as to a portion of his property, the statute, not the court, declares who are interested in it. The widow might

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have been, but she elected otherwise and thus relieved the real estate from the burden of dower. (*Chamberlain v. Chamberlain*, 43 N.Y. 424; *Matter of Benson*, 96 id. 499; *Vernon v. Vernon*, 53 id. 351-362; *Caulfield v. Sullivan*, 85 id. 153; *Hone v. Van Schaick*, 7 Paige, 221-232.)

The doctrine of estoppel cannot be invoked against the heirs for there is nothing on which to found it. The widow does not claim to have been misled into the making of an election by anything which they said or did. It is not even suggested that had she been put to her election with knowledge of the invalidity of so much of the will as related to the New York real estate, she would have acted differently.

The judgment should be modified by striking out the following "subject, however, to the right of dower therein, of the defendant Amelia Malvina Tower, widow of the said Charlemagne Tower, deceased, to be admeasured the same as if he had died intestate," and, as thus modified, affirmed with costs to both parties payable out of the estate.

All concur.

Judgment accordingly.

WESLEY MANDEVILLE, as Receiver, etc., Appellant, v. EDWARD H. AVERY, Impleaded, etc., Respondent.

A chattel mortgage not accompanied by immediate delivery or followed by an actual or continued change of possession of the chattels mortgaged, and which was executed upon an agreement that the mortgagor may remain in possession and sell the property and use the avails in substantially the same manner as before the execution of the mortgage, is void as against the creditors of the mortgagor.

The term "creditors" includes all persons who were such while the chattels remained in the possession of the mortgagor under the agreement, and their rights are not affected by the fact that they did not obtain judgment or a specific lien until after delivery of the property to the mortgagee.

The right of the creditor to collect his debt out of the mortgaged chattels may not be defeated by the mortgagee, simply by selling the property. An assent by a creditor to such an arrangement between the mortgagor and mortgagee, which would preclude him from asserting his rights as

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a creditor against the mortgaged property, must be such as to create against him an equitable estoppel, or it must exist in agreement supported by a valid consideration.

Where an alleged assent was made upon condition that the mortgagor should return to the creditor a portion of the goods purchased of him, the purchase-price for which constituted the indebtedness, and would make payments to the mortgagee, neither of which conditions were complied with, *held*, that there was no consideration for the assent; and so, it was not binding.

A creditor may not be deprived of his legal right to attack a chattel mortgage as fraudulent by an agreement made with his agent, waiving or surrendering such right, without evidence that he knew of the defect in the mortgage, and had authorized the agent to make the agreement, or had acquiesced in it when made.

Although the mortgagee may possess an honest claim, he cannot retain, as against a pursuing creditor, property obtained by him under his mortgage if it is fraudulent; and although he took and sold the property by virtue of the mortgage before any lien was obtained thereon by the creditor he may be compelled by the latter to refund the proceeds; the mortgage being void, all proceedings under it are void.

A receiver appointed in supplementary proceedings under the Code of Civil Procedure is vested with the legal title to all the personal property of the judgment debtor; he also represents the creditor under whose judgment he was appointed, and has the same right the creditor possesses to prosecute actions to set aside all transfers of property made by the debtor to defraud his creditors.

The rights of the receiver in this respect are not confined to the property fraudulently assigned; he may follow the proceeds of the sale thereof in the possession of any person not a *bona fide* owner or holder.

In an action brought by a receiver appointed in supplementary proceedings to have two chattel mortgages covering the same property executed by the debtor set aside as fraudulent, and to compel the defendant A., the mortgagee in one of the mortgages and the assignor of the other, to account for and pay over the proceeds of sale of the mortgaged property, A. pleaded the pendency of a former suit in bar. That was an action brought by A. to recover possession of the property which had been levied upon under an attachment issued in favor of the judgment creditor against the debtor. Defendant in that action justified under the attachment, and alleged "that any transfer of said goods to the plaintiff was in fraud of creditors and void." The judgment therein decided that A. was the owner and entitled to the possession of the property. This judgment was reversed on appeal, and the action was still pending. One of the mortgages was shown to be fraudulent and void. *Held*, that the pending of the former action was not a bar to a recovery of the proceeds of the property sold to satisfy the void mort-

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gage; that to establish his right to recover in that action, A. was only required to prove one valid mortgage, and so, that the invalidity of the other was not necessarily involved.

Mandeville v. Avery (57 Hun, 78), reversed.

(Argued February 6, 1891; decided March 3, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 20, 1890, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

This action was brought to have two chattel mortgages executed by the defendant Henry J. Beck to the defendant Edward H. Avery and the National Bank of Auburn, adjudged fraudulent and void, and to require the defendant Avery to account for the proceeds of the sale of the mortgaged property and pay over to the plaintiff such part of said proceeds as was necessary to satisfy the judgment of Lewis P. Ross, a creditor of said Beck, with the costs of supplementary proceedings, etc.

The opinion states the facts.

David Hays for appellant. The action is maintainable by plaintiff as receiver in supplementary proceedings. (*Adsit v. Butler*, 87 N. Y. 585; *Lawrence v. Bank of Republic*, 35 id. 320; *Storm v. Wadell*, 2 Sandf. Ch. 494; *Wait on Fraud. Conv.* §§ 4, 51, 52, 61, 68; *Campbell v. E. R. Co.*, 46 Barb. 540; *Loos v. Wilkinson*, 110 N. Y. 195; *Clements v. Moore*, 6 Wall. 299; *Murtha v. Curley*, 90 N. Y. 372; *Wright v. Nostrand*, 94 id. 31, 43; *Hugh on Receivers*, § 454; *Bostwick v. Mench*, 40 N. Y. 383; *Davenport v. McChesney*, 86 id. 242; *Parish v. Wheeler*, 22 id. 494.) A receiver in supplementary proceedings is entitled to maintain an action of this character under Laws of 1858, chapter 314. (R. & B. on Sup. Pro. 385; *Underwood v. Sutcliffe*, 77 N. Y. 58, 62; *Porter v. Williams*, 9 id. 142.) The question as to plaintiff's right to maintain this action as receiver, not having been taken by demurrer, was waived. (*Perkins v. Stimmel*, 114 N. Y. 359.)

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The conclusion of the court that the transaction between Gordon and Avery was an agreement that the bank should hold the mortgage, is unwarranted. (*McClure v. Lockard*, 121 N. Y. 308; *Creque v. Sears*, 17 Hun, 123.) The plaintiff may be precluded from assailing the mortgage only on the ground of an equitable estoppel. (Bump on Fraud. Conv. 466; 2 Pom. Eq. Juris. 499; *E. F. Co. v. Hersee*, 33 Hun, 169; *Sternfield v. Simmonson*, 44 id. 429; *Iselin v. Henlein*, 16 Abb. [N. C.] 73; *Hays v. Heidelberg*, 9 Penn. St. 203; *Haydock v. Coope*, 53 N. Y. 68, 76; *Stout v. Stout*, 77 Ind. 537; Bigelow on Estoppel, 508; *Brace v. Gould*, 1 T. & C. 226; *Sanford v. McDonald*, 25 N. Y. S. R. 721; *Littlefield v. Littlefield*, 91 N. Y. 203, 210; *Winegar v. Fowler*, 82 id. 315.) It was error to submit the question of "Assent" to the jury or to make any finding with reference thereto, because it was not pleaded as a defense. (Pom. on Rem. § 712; *Romeyn v. Sickles*, 108 N. Y. 650.) Avery's right to retain the proceeds of the mortgaged chattels depends solely upon the validity of the mortgage, and not on the good faith of his demand as a creditor of Beck. (*Quinn v. Hart*, 48 Hun, 393; *Wilson v. Voight*, 9 Col. 614, 619; *Dutcher v. Swartwood*, 15 Hun, 31; *Stimson v. Wrigley*, 86 N. Y. 332, 339; *Wells v. Langbein*, 20 Fed. Rep. 183; Wait on Fraud. Conv. § 357; *Murtha v. Curley*, 90 N. Y. 372; *Billings v. Russell*, 101 id. 226; *Jones v. Graham*, 77 id. 628; *Coope v. Bowles*, 42 Barb. 87; *Mecham v. Collignon*, 7 Daly, 402.) Defendant's defense, of a former suit pending, is untenable. (*Avery v. Mead*, 12 N. Y. S. R. 749; *Dawley v. Brown*, 79 N. Y. 390; *Campbell v. Butts*, 3 id. 173; *Stillman v. Northrop*, 109 id. 473, 480.)

J. C. Avery for respondent. The plaintiff is not entitled to a new trial, because the complaint does not state facts sufficient to constitute a cause of action. (Code Civ. Pro. § 499; *Coffin v. Reynolds*, 37 N. Y. 640; *Gould v. Glass*, 19 Barb. 179, 186; *Tooker v. Arnoux*, 76 N. Y. 307; *Van Alostyne v. Freday*, 41 id. 174; *Schuyler v. Smith*, 51 id. 309; *Munger v. Shannon*, 61 id. 251.) The action cannot be maintained by

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the receiver of the property of the judgment debtor. (Riddle on Sup. Proc. 121; *Gardner v. Smith*, 29 Barb. 68; *Steward v. Cole*, 43 Hun, 164.) The plaintiff cannot maintain this action against the defendant Avery, as a trustee *ex maleficio*. (Bump on Fraud. Conv. 532, 608, 609; *Lawrence v. Bank*, 35 N. Y. 321; *Campbell v. E. R. Co.*, 46 Barb. 552; *Bostwick v. Mench*, 40 N. Y. 389; *Underwood v. Sutcliffe*, 77 id. 58, 63.) The plaintiff's complaint was properly dismissed, because the undisputed proof and admissions show that all the proceeds in question were applied to the payment of *bona fide* debts of the judgment debtor, long prior to the commencement of this action. (Bump on Fraud. Conv. [3d ed.] 608; *Haggerty v. Palmer*, 6 Johns. Ch. 436; *Ames v. Blunt*, 5 Paige, 13, 24; *Wakeman v. Grover*, 11 Wend. 187; Bishop on Insolv. Debt. 229; *Averill v. Loucks*, 6 Barb. 470; 24 N. Y. 505; 28 id. 667; 3 How. Pr. 185; 5 Johns. Ch. 280; 4 Barb. 560; 7 Hump. 367; *Peacock v. Tompkins*, Meigs, 317; *Grover v. Wakeman*, 11 Wend. 187.) The complaint was properly dismissed, because the plaintiff had failed to prove a cause of action. (Bump on Fraud. Conv. 533, 600; 2 R. S. 135, § 5; *Gardiner v. Smith*, 29 Barb. 68; *Steward v. Cole*, 43 Hun, 164; *N. C. N. Bank v. Lord*, 33 id. 557; *Dorothy v. Servis*, 46 id. 628; *Pettibone v. Drakford*, 37 id. 628; *Southard v. Benner*, 72 N. Y. 424-426; *Sullivan v. Miller*, 106 id. 641.) The court made no error in its conclusion of law, that the mortgage to the National Bank of Auburn was not fraudulent and void as against the judgment of said Ross, nor the plaintiff in this action. (*Bissel v. Hopkins*, 3 Cow. 188; *Hanford v. Artcher*, 4 Hill, 296; *Frost v. Mott*, 34 N. Y. 256; Thomas on Chattel Mort. § 283; *Nugent v. Jacobs*, 103 N. Y. 125; *Jewett v. Noteware*, 30 Hun, 192-194; 3 Bump on Fraud. Conv. 464, 493; *Bolt v. Rogers*, 3 Paige, 154; *Gale v. Gale*, 19 Barb. 249; *Chamberlain v. Barnes*, 26 id. 160-163; *Gardenier v. Tubbs*, 21 Wend. 171; *People v. Gonzalez*, 35 N. Y. 49, 59; *Buck v. Waterbury*, 13 Barb. 116; *Crary v. Sprague*, 12 Wend. 41; *Krekeler v. Ritter*, 62 N. Y. 372; *Gardner v. Buckbee*, 3 Cow. 120.) The testimony

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of the defendant Avery as to his knowledge of the intent of the bank officials was properly received. (*Sperry v. Baldwin*, 46 Hun, 120, 128; *Seymour v. Wilson*, 14 N. Y. 567; *Griffin v. Marquardt*, 21 id. 121.) Evidence of what was done in regard to a general assignment by Beck was admissible. (Greenl. on Ev. § 51; *People v. Gonzalez*, 35 N. Y. 49, 59; *Buck v. Waterbury*, 13 Barb. 116; *Crary v. Sprague*, 12 Wend. 41.) The evidence as to the application of the proceeds was proper. (*Smith v. Cook*, 3 Sandf. Ch. 333; *Peacock v. Tompkins*, Meigs, 317; Bump on Fraud. Conv. [3d ed.] 608.)

BROWN, J. The mortgage to the National Bank of Auburn, which was subsequently assigned to Mr. Avery, was executed January 24, 1887. The mortgage to Avery was executed February 8, 1887. As to the first mortgage, the court found that it was not accompanied by an immediate delivery, or followed by an actual or continued change of possession of the chattels mortgaged, and that it was executed upon an agreement with the bank that the mortgagor might remain in possession of the property covered by the mortgage and sell the same at retail in substantially the same manner as before the execution of the mortgage and use the avails.

Similar findings as to the Avery mortgage were refused. The court found, as a conclusion of law, that the mortgage to Avery was valid, and that the mortgage to the bank was not fraudulent and void as against the judgment of said Ross, nor the plaintiff in this action.

There was ample evidence to support the findings aforesaid, and the validity of the Avery mortgage cannot be questioned on this appeal.

The finding quoted in reference to the mortgage to the bank rendered it void as to the creditors of the mortgagee. (*Gardner v. McEwen*, 19 N. Y. 123; *Russell v. Winne*, 37 id. 591; *Southard v. Benner*, 72 id. 424; *Potts v. Hart*, 99 id. 168; *Brackett v. Harvey*, 25 Hun, 502; *Bainbridge v. Richmond*, 47 id. 391.) And the term creditors includes all persons who were such while the chattels remained in possession of the

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mortgagor under that agreement, and it was not essential to their rights that they did not obtain judgment or a specific lien until after delivery of the property to the mortgagee. (*Stimson v. Wrigley*, 86 N. Y. 332; *Dutcher v. Swartwood*, 15 Hun, 31.)

The conclusion that this mortgage was not void as against the judgment of Ross or the plaintiff was based upon a finding that Ross, the judgment creditor, with full knowledge that the agreement in reference to the possession of the mortgaged property had been entered into, assented to such arrangement.

This finding is challenged by the appellant on the ground that there is no evidence tending to support it and whether there is or not, is the vital question in the case.

We are of the opinion that this finding cannot be sustained.

An assent by a creditor to an arrangement between the mortgagor and mortgagee which would preclude him from asserting his rights as a creditor of the mortgagor against the mortgaged property must be such as to create against him an equitable estoppel or it must exist in agreement and in such case must be supported by a valid consideration.

It could not be claimed in this case that there was an estoppel. The mortgage was executed and delivered and the illegal agreement made before Ross or his agent knew of it, and there is no evidence and no claim that Mr. Avery did any act to his own prejudice or adopted any line of conduct by reason of anything said or done by Ross or on his behalf.

Nor was there any valid agreement. Without stating in detail the evidence, it appears that Beck when he applied to Ross to sell him goods, informed him that Mr. Avery, who was president of the bank, was to loan him one thousand dollars to be used in his business without security. Ross inquired of Avery by letter if that statement was true and Avery replied that he had agreed to help him to the extent of one thousand dollars.

Ross understood this as an affirmative answer to his question, and made the sale. Soon after the mortgage was given, Ross learned of it and sent his agent, Gordon, to Auburn to inquire

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about it. He called on Avery and asked him why he took the mortgage after it was understood that the loan was to be without security. Avery told him that Beck had offered to give it, as he had used some of the money loaned him in paying incumbrances on his property, and that the bank would let him go on as if no mortgage had been made. Gordon replied that if Beck would continue in business and pay Ross a little now and then he would be satisfied, and that Beck had some of the goods which Ross had sold him which were out of season, and if he would return them he would have credit. Avery said that any arrangement that Gordon made with Beck about payment or return of the goods would be satisfactory to him.

This conversation took place on February third, and on February eighth Beck gave Avery another mortgage whereupon he immediately took possession of the stock in the store and proceeded to sell it out under both mortgages.

There is no evidence in the case that Gordon had any authority from Ross to make an agreement to waive or surrender his right to attack the mortgage as fraudulent, or that the fact of such an agreement ever was communicated to him or that he acquiesced therein if it was told to him, and none that he ever knew, prior to the commencement of this suit, of the agreement between the mortgagor and mortgagee which rendered the mortgage void.

I think a creditor could not be deprived of his legal rights as a result of an agreement made with his agent without some evidence that he knew of the defect in the mortgage, and had authorized his agent to make an agreement in reference thereto or had acquiesced in it when made, and this case is barren of any evidence tending to show any of these facts.

But it is not necessary to rest our decision on that ground.

Assuming Gordon to have had full authority to negotiate with Avery and make the arrangement testified to, there was no consideration for the agreement.

The only consideration claimed is in the implied promise of Avery to release from the lien of his mortgage the goods that Beck should return to Ross, and the payments that he would

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make to him presumably out of the proceeds of sales at the store.

But no payments were ever made and no goods were returned, and the mere promise to release in case Beck returned the goods, did not constitute a consideration. It was conditioned solely upon Beck's action, and could become operative and binding only in case the goods were returned and payments made. It would be a remarkable proposition that Ross could be held to his contract in consideration of the return of goods never delivered to him and payments on account of his claim never made. The agreement, if it may be called such, was conditioned solely upon acts of Beck which were never performed.

Moreover it does not appear that Gordon expressed himself as satisfied that the bank should hold the mortgage, but with the statement of Avery that the bank would let Beck go on with the business. Avery testified that he told Gordon that it was his desire that he (Beck) should continue, and he saw no reason why he should not; that there was no disposition by the bank to injure him or press him, and that he hoped he would go on and continue in business and pay his liabilities; that it was for the interest of all parties that he should go on and finish his work and make it valuable, and that Gordon said "that would be satisfactory to him." If this was evidence of a contract it certainly meant that Avery would not enforce the mortgage, and assuming that Gordon knew that the agreement between the bank and Beck rendered that instrument void as to creditors, he might very well have expressed his satisfaction with the situation. Both parties were thus left in their original situation with reference to each other. Neither had preference over the other, and both relied upon the business to repay their debts, and this is all that, in my judgment, can fairly be inferred from the testimony.

The judgment must, therefore, be reversed, unless the other points made by the respondent can be sustained.

It is claimed that the plaintiff as receiver cannot maintain this action.

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A receiver appointed in supplementary proceedings under the Code is vested with the legal title to all the personal property of the judgment debtor, and has the further right to prosecute actions to set aside all transfers of property made by the debtor to defraud his creditors.

For the purpose of maintaining such actions he represents the creditors and possesses the same rights as the creditor under whose judgment he was appointed would himself have had. (*Becker v. Torrance*, 31 N. Y. 631; *Bostwick v. Menck*, 40 id. 383; *Wright v. Nostrand*, 94 id. 31.) And his rights in this respect were not confined to the assigned property, but he could follow the fund or proceeds of the sale thereof into the possession of any person not a *bona fide* owner or holder thereof.

If the creditor could have secured a levy by execution upon the mortgaged property before a sale thereof, the fraudulent mortgagee could not have held the property against the sheriff. (*Brewing Co. v. Hart*, 48 Hun, 393; *Sperry v. Baldwin*, 46 id. 120; *Stimson v. Wrigley*, 86 N. Y. 332.)

The right to collect the debt out of the mortgaged property could not be defeated by the mortgagee simply by selling the property.

The same right that existed against the property would exist in favor of the creditor against the proceeds of the sale in the possession of the mortgagee, and an action to reach such a fund would be maintainable either by the creditor or by a receiver appointed in supplementary proceedings under the judgment. To hold otherwise would be to decide that the beneficial provisions of the statute could be defeated by a fraudulent mortgagee or vendee by merely selling the assigned property, and as this could in the great majority of cases be done before a judgment could be obtained by the creditor, and a levy made, the statute would be practically annulled. (*Dutcher v. Swartwood*, 15 Hun, 31.)

The General Term, however based its decision upon the ground that the debt to the bank having been a valid one and having been paid out of the mortgaged property before any

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lien was obtained thereon, another creditor could not compel the mortgagee to refund the money on the ground that as against creditors generally the mortgage given to secure the paid debt would have been adjudged void.

Two classes of cases are cited by that learned court to sustain this conclusion.

First, those holding that an assignee acting under a void assignment will not be held accountable for such of the proceeds of the assigned property paid out by him to creditors in pursuance of the assignment before any other creditor has obtained a lien upon the assigned property.

Second, that the objection that a chattel mortgage is void is not available, when, before any creditor had questioned its validity, the mortgagor delivered the chattels to the mortgagee and authorized an immediate sale thereof by him.

I am unable to see that the first class of cases has any application to the facts before us.

As to the second, there is no doubt as to the right of a debtor to prefer any creditor and to pay his debt in full, either in money or property, to the exclusion of all others.

But to apply that principle to this case, is to ignore completely the facts pleaded and found by the court. There was no claim that the property sold was turned over by Beck to Avery in payment of the debt. The complaint alleged that the property was sold by Avery under the mortgage, and this fact was not denied by the answer. The court also found that Avery, by virtue of both mortgages, took possession of the mortgaged property, and as such mortgagee caused the same to be advertised at public sale and sold under said mortgages.

There is nowhere any suggestion in the evidence or findings that the mortgage was waived or abandoned, or that the debtor had voluntarily delivered the property to Avery with authority to sell it.

Everything that was done was pursuant to and under the mortgages. Avery could not and did not claim to have received the property or the proceeds of the sale in payment of his debt as the voluntary act of the debtor, but as mortgagee.

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He cannot, therefore, assert against the claim of other creditors the honesty of his own debt. The mortgage being void, all proceedings under it were void, and although he may possess an honest claim, he cannot retain property obtained by him under a fraudulent mortgage against a pursuing creditor. The proceedings taken to collect the debt are unlawful. (*Murtha v. Curley*, 90 N. Y. 372; *Billings v. Russell*, 101 id. 226-231; *Wells v. Langbein*, 20 Fed. Rep. 183.) It is further claimed that the judgment in the case of *Avery v. Mead* was a bar to this action. That was an action brought by defendant to recover possession of the mortgaged property from the sheriff, who had levied upon it under an attachment issued in favor of Ross and against Beck.

It appeared upon the trial that the judgment in that action, which was set out in the answer and which adjudged Mr. Avery to be the owner and entitled to the possession of the mortgaged property, had been reversed and a new trial granted, but the court found as a fact that the action was still pending.

We may, therefore, treat the defense as a plea of a former action pending. To sustain such a plea it must appear, from the pleadings in the first action, that it was for the same cause as the second or involved necessarily the same question. It is not enough that the same property is in controversy in both actions. (*Dawley v. Brown*, 79 N. Y. 390.)

The complaint in *Avery v. Mead* alleged that on February 16, 1887, the plaintiff was lawfully possessed of the property therein described, which was the mortgaged property, and that the defendant wrongfully took said property from the plaintiff.

The defendant justified under an attachment issued in the suit of *Ross v. Beck*, and alleged that the goods levied upon by him were the property of Beck, and "that any pretended transfer of said goods to the plaintiff was in fraud of creditors and void."

We need not speculate what result might follow the trial of that action. It is plain that to succeed in his defense the sheriff would necessarily be compelled to establish the invalidity of both of the mortgages held by Mr. Avery.

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But it was not essential to Avery's success that he should establish the validity of both.

The right to the possession of the mortgaged property could have been successfully asserted under the second mortgage, and the validity of the mortgage to the bank did not, therefore, necessarily come in issue.

Avery might have recovered possession of the mortgaged property in the action against the sheriff, and not be able to sustain the validity of the bank mortgage.

In other words, the validity of the bank mortgage, which is the sole inquiry here, was not necessarily involved in the action against the sheriff.

Hence the pendency of that action was not a defense to this.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except FOLLETT, Ch. J., dissenting, BRADLEY and HAIGHT, JJ., not sitting.

Judgment reversed.

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In the Matter of the Final Judicial Settlement of the Accounts
of MORTIMER F. REYNOLDS, as Executor, etc.

It seems that general words, following an enumeration of articles in the residuary clause of a will, are to be given the broadest and most comprehensive meaning of which they are susceptible, in order to prevent intestacy as to any portion of the testator's estate.

Except, however, in a residuary clause or where the will contains no such clause, when certain things are named in a devise or bequest, followed by a phrase, which need not, but may be, construed to include other articles, it will be confined to articles of the same general character as those enumerated.

R. devised and bequeathed to his son M. certain real estate "with all the lands, buildings and appurtenances thereunto belonging, or in anywise appertaining, and including all the furniture and personal property in and upon the same, or in any manner connected therewith." The testator's office was in a building on the property so devised, and connected with it was a vault in which money and securities were kept, and when the testator died this vault contained certain securities which M. claimed under said provision of the will. The will contained a residuary clause

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under which the securities would pass, in case M.'s claim was not sustained. *Held*, that the general words in the bequest to M. did not include the securities.

By other clauses of his will, R. devised to his wife his homestead, and gave to her "the use, for life, of all household furniture * * * and all other personal property other than money, choses in action and securities, which shall be in and upon the premises at my said homestead or habitually kept there at the time of my decease." M. claimed that the omission to make a similar exception in the provision made for him should be taken as an indication of an intention to give to the words "personal property" therein their most comprehensive meaning. *Held*, that such omission was not controlling, but simply a circumstance to be considered in connection with the whole will, in attempting to ascertain and to give effect to the testator's intention.

Upon the accounting of the executors of the will, the surrogate refused to credit them with \$250 paid to a commandery of which the testator was a member, for parading at his funeral, and which did not appear to have been demanded by it as a condition of participation. *Held*, no error.

(Argued February 6, 1891; decided March 3, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 1, 1889, which affirmed a decree of the surrogate of the county of Monroe.

The record presents the proceedings had upon the final judicial settlement of the accounts of Mortimer F. Reynolds, as executor of the last will and testament of Abelard Reynolds, deceased. The decree in which such proceedings finally resulted proved unsatisfactory to the executor and appellant in two respects:

1st. It decreed that certain stocks, bonds, leases and bank-books of the value of about \$12,000, which were in a safe in the arcade at the time of testator's death, did not pass to Mortimer F. Reynolds individually under the third clause of the will, but became a part of the residuary estate provided for by the fifth clause.

2d. It adjudged that a payment of \$250 by the executor to the Monroe Commandery was not chargeable against the estate as part of the funeral expenses.

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The will of said Abelard Reynolds provided as follows :

"First. I give and devise to my wife Lydia S. Reynolds the homestead where I now reside, on Fitzhugh street in said city of Rochester, with all the lands, privileges and appurtenances thereto belonging or appertaining, to have and to hold the same to her own use during the continuance of her natural life.

"Second. I give and bequeath to my said wife all the provisions and supplies of every kind which may be on hand at my said homestead at the time of my decease, and the use during her life of all the household furniture, goods, horses, carriages, harness and all other personal property (other than money, choses in action and securities) which shall be in or upon the premises at my said homestead or habitually kept there at the time of my decease.

"Third. I give, devise and bequeath to my son Mortimer F. Reynolds my property situated upon West Main street (formerly Buffalo street) in said city of Rochester, extending through to Exchange place in the rear, known as Reynolds' arcade, including also East arcade (so-called), with all the lands, buildings and appurtenances thereunto belonging, or in anywise appertaining, and including all the furniture and personal property in and upon the same, or in any manner connected therewith, to have and to hold the same to his own use and benefit forever, subject, however, to the payment of the following sums, which are hereby made a distinct charge thereon, viz. :

"An annuity of three thousand dollars to my said wife, to be paid to her in four equal quarterly payments from and after my decease in each year during the continuance of her natural life. Also the sum of fifty thousand dollars, with annual interest thereon from the time of my decease, to my granddaughter Clara L. Amsden, and the like sum of fifty thousand dollars, with like interest, to my granddaughter Sophia C. Strong, to be paid to them respectively, as follows: In annual instalments of at least ten thousand dollars per annum to each of them, to be applied first to the payment of the interest which may be then due, and the residue upon the

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principal until the whole is paid. The first instalment to be paid at the expiration of one year from the time of my decease, with the privilege, however, of paying a greater amount at any time, to the extent of all that may remain due and unpaid.

“Fourth. In case my said wife should refuse to accept the foregoing provisions made in her behalf, which, if accepted, are intended to be in full satisfaction and discharge of her right of dower, and of all other interest or claim which she may have in or upon any portion of my estate, real or personal, then and in that case only two-thirds of the aforesaid sum of fifty thousand dollars bequeathed to each of my granddaughters, with the interest thereon, that is, upon the said two-thirds, shall be paid during the life-time of my wife; but upon her decease all that may remain unpaid of the whole bequest of fifty thousand dollars to each of my said granddaughters, with interest thereon, shall become due and payable, and the instalments herein above provided for shall be continued until the whole is paid. No interest, however, is to be computed or paid upon the one-third, payment of which is suspended during the life of my said wife, except from and after the time of her decease.

“Fifth. I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, to my said son and executor, Mortimer F. Reynolds, in trust, to sell and dispose of the same, and convert the whole into money, or into good and safe securities, and out of the proceeds to pay first, to my granddaughter Sophia C. Strong, a sum which, when added to the advances made to her either by myself or by my deceased son William A. Reynolds, in his life-time, and now charged upon my books, shall be equal to the advances similarly made to my granddaughter Clara L. Amsden, also charged upon my books; and, after such payment, to pay to himself or retain out of the residue of such proceeds a sum which, when added to the sum charged as advances against him, the said Mortimer F. Reynolds, upon my books, shall be equal to the sum so advanced to each of my granddaughters. The remainder of the trust funds to be realized from the sale

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herein directed to be divided equally between my two granddaughters, one-half to each.

"The furniture and personal property, the use of which is given, in connection with the homestead, to my wife, is not, however, to be sold, in case she accepts the provisions herein made for her benefit, until after her decease, and whenever sold the avails are to be divided equally between my said granddaughters.

"*Sixth.* At any sale which may be made in pursuance of the foregoing directions the said Mortimer F. Reynolds is to be permitted to bid, and to have the same right and privilege of becoming a purchaser as if he were not named or acting as trustee.

"*Seventh.* As I have already provided for my sister Mary by gifts heretofore made, I make no further provision for her in this will.

"Lastly, I hereby constitute and appoint the said Mortimer F. Reynolds sole executor of this my last will and testament."

Theodore Bacon for appellant. The language of the testator in the third clause of the will is ample to transfer the property in dispute to Reynolds individually. (*Swinfen v. Swinfen*, 29 Beav. 207; *In re Scarborough*, 30 L. J. Prob. 85; 6 Jur. N. S. 1166; *Hotham v. Sutton*, 15 U. S. 319; *Cambell v. Prescott*, Id. 503; *Michell v. Michell*, 5 Mad. 69; *Hearne v. Wigginton*, 6 id. 82; *Flemming v. Burrows*, 1 Russ. 276; *Taubenhan v. Dunz*, 125 Ill. 524; *Mahoney v. Donovan*, 14 Ir. Ch. 262, 388; *Tyrone v. Waterford*, 1 DeG., F. & J. 613; *Stuart v. Earl of Bute*, 3 Ves. 212; *Sock v. Myers*, 9 N. H. 430; Bouvier's Law Dic. tit. Property.) The comparison of analogous clauses in the same instrument shows the intent of the testator. (*Sanderson v. Dobson*, 1 Exch. 141; *Doe v. Earles*, 15 M. & W. 450; Broom's Leg. Max. 452-454; *Strong v. White*, 19 Conn. 238; *Arnold v. Arnold*, 2 M. & K. 365; *McLaughlin v. McLaughlin*, 24 Penn. St. 20.) The item of funeral expenses of the testator paid to the "Monroe Commandery," was properly paid. (*Offley v. Offley*, Proc.

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Chan. 261; *Price v. Archbishop of Canterbury*, 14 Ves. 364; *Mullich v. Mullich*, 1 Knapp, 245; *Jennison v. Hapgood*, 10 Pick. 77; *Garvey v. MacCue*, 3 Redf. 313.)

Spencer Clinton and *D. D. Sully* for respondent. The property did not pass to Reynolds individually. (*Johnson v. Goss*, 128 Mass. 434; *Dold v. Johnson*, 3 Allen, 364; *Kennifer's Appeal*, 52 Mich. 352; *Spark's Appeal*, 89 Penn. 148; 1 Jarman on Wills, 760; *Woolcomb v. Woolcomb*, 3 P. Wms. 112; *Hutchinson v. Rough*, 40 Law Times, 289; *Hodgson v. Jax*, 2 Ch. Div. 122.) The word "property," as used in the third clause of the will, does not include choses in action. (*Pippin v. Allison*, 12 Ir. Law, 61; *Young v. Young*, 3 Jones' Eq. 216; *Lowe v. Carter*, 2 id. 378; *Scales v. Scales*, 6 id. 168; *Fraser v. Alexander*, 2 Eq. Div. 348; *Bradley v. Jones*, 2 Ired. Eq. 248; *Alexander v. Alexander*, 6 id. 229; *McGlaughlin v. McGlaughlin*, 24 Penn. 20; *German v. German*, 26 id. 116; *State v. Spaulding*, 19 Conn. 238.) Choses in action do not pass under a bequest like the present under the description of property to a certain place, for the reason that they have no locality. (*Flemming v. Brook*, 1 S. & LeF. 318; *Arnold v. Arnold*, 2 M. & K. 274; *Moore v. Moore*, 1 Brown's Ch. Cas. 127, 129; *Hertford v. Lowther*, 7 Beav. 1; *In re Aylesbury*, 11 Ves. 662; *Brooks v. Turner*, 7 Sim. 671; *Reed v. Stewart*, 4 Russ. 69; 2 Williams on Exrs. 1178; *Jones v. Sexton*, 4 Ves. 166; *Webster v. Wiers*, 51 Conn. 569; *Benton v. Benton*, 1 East, 247; *Wolf v. Scheffner*, 51 Wis. 53; *Manton v. Dubois*, 30 Ch. Div. 92; *Collier v. Squire*, 3 Russ. 467.) If the bank-book and certificate are to be taken as the money they represent, then under the general words employed, it would not pass. (*Campbell v. McGrair*, 9 Ir. Eq. 397; *Dutton v. Hockenhull*, 22 Wkly. Dig. 701; *Watson v. Arundul*, 10 Ir. Eq. 299; *Robert v. Kuffin*, 2 Atk. 113; *Gibbs v. Lawrence*, 30 Law J. Ch. 170; *Saunders v. Earle*, 2 Ch. Rep. 188.) The surrogate properly struck out the item paid to the Monroe Commandery. (*Powers v. Powers*, 48 How. Pr. 389.)

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PARKER, J. The testator's office was in the building devised to his son by the third subdivision of the will ; connected with it was a vault, and within the vault a safe in which money and securities were kept. When he died, a bank-book, certain securities of different kinds and money were there. These, the appellant contends, passed to him under such subdivision, by which the testator devised to him, subject to a charge, the "Arcade * * * including all the furniture and personal property in and upon the same, or in any manner connected therewith." And he challenges the determination of the Surrogate's Court that a proper construction of the will limits the bequest to such personal property in addition to furniture as properly belonged to and was employed by the testator in the use which he made of the building devised.

Our attention has not been called to any authority in this state which can be made serviceable in determining the question presented. But in England and in several states in this country, the courts have had under consideration the rule which should guide the court in determining whether general words following an enumeration of articles in a bequest should be limited to things of the same general character as those enumerated, or be given the most enlarged meaning of which they are capable.

Appellant's counsel calls special attention to *Campbell v. Prescott* and *Hotham v. Sutton* (15 Ves. 500 and 319). In *Campbell's* case, the court refers with approval to the observation of Lord MANSFIELD that the word "effects" is equivalent to "property" or "worldly substance." And in *Hotham's* case, the words "other effects," in the connection in which they were there used, were held not to be restricted to things of the same kind as those specially enumerated. In the first case the general words following an enumeration occurred in a residuary disposition, and in such cases the settled rule is that they will be given the broadest and most comprehensive meaning of which they are susceptible, in order to prevent intestacy as to any portion of the testator's estate.

In the latter case the testatrix, having two sons and a

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daughter, B, C and D, bequeathed for their benefit a sum in consols, and gave all the residue of her personal estate to her youngest children, C and D. On the same day she executed a codicil and revoked so much of her will as related to the bequest to her son C of a share of her "plate, linen, household goods and other effects (money excepted)," and gave the whole thereof to her daughter.

It was held that the words "and other effects" were not restrained by the prior terms to articles *ejusdem generis*, and, therefore, the revocation extended to the general residuary personal estate. Lord ELDON, in delivering the opinion of the court, declared the doctrine to be settled that the words "other effects in general mean effects *ejusdem generis*." But held the rule not applicable to the case under consideration, because the exception made it apparent that the testatrix did not so understand it. He said "money cannot be represented as *ejusdem generis* with plate, linen and household goods." The express exception of money out of the "other effects" shows her understanding that it would have passed by those words; that express words were required to exclude it; and by force of the exclusion in the excepted articles she says she thought that the words of her bequest would carry things not *ejusdem generis*.

In *Swinfen v. Swinfen* (29 Beav. 207), the will recited: "I give to Mrs. Swinfen, my son's widow, all my estate at Swinfen, or thereto adjoining, also all furniture and other movable goods here." It did not contain a residuary clause. And it was held that the general words were not restricted to things *ejusdem generis*. And, therefore, the live stock and implements of husbandry on the lands, as well as money in the house at testator's death, passed to the legatee.

In *Michell v. Michell* (5 Mad. 69), the bequest was of "all and singular his plate, linen, china, household goods and furniture and effects that he should die possessed of." The court said that while the words furniture and effects are frequently used in a restricted sense, meaning goods and movables, that the fact that the word furniture was preceded by the word

“and,” and “effects” followed by the phrase “that he should die possessed of,” leads to the conclusion that it was used in a more enlarged sense and embraced all his personal estate.

In *Fleming v. Burrows* (1 Russ. 276), the bequest was to testator's son of “my furniture, plate, books and live stock, or what else I may then be possessed of at my decease.” It was followed by a few specific bequests and the question was whether the general residue of the testator's personal property passed to the son. It was urged that the word “then” was evidently written by mistake instead of “there;” that it should be read as intended; and if that be done, the bequest having reference to locality must be treated as specific and not general. The court did not agree with such construction and held that it disposed of the entire personal estate, remarking in the course of the opinion that the instrument contains no residuary clause unless the words “or what else I may then be possessed of at my decease” are to be so construed.

In *In re Scarborough* (30 L. J. Prob. 85), the bequest was of “all my personal effects, and everything of every kind that I now have or may have at the time of my decease in my apartments at the above-named 13 Plaistow Grove, West, or elsewhere.” Upon the application for letters of administration, a doubt was suggested whether the personal estate of testatrix, not in her apartments in Plaistow Grove or other apartments, was embraced in the bequest or passed to the next of kin, because as to it she died intestate. It was held that the words or elsewhere referred not to the locality of apartments, but to the effects of deceased and disposed of all the personal estate.

In *Taubenhan v. Dunz* (125 Ill. 524), the bequest to the devisee and legatee named in the will was as follows: “Also \$3,000 in money, to be paid to her by my executor; also all the loose property in, on and around the homestead consisting of one cow, two hogs, and a lot of wood, and all other property of every kind.”

The testator owned other promissory notes for money loaned. It was held that as to them he did not die intestate. That they passed to the legatee under the will. In *Mahony v.*

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Donovan (14 Irish Ch. 262-388), a bequest of "all my right and title to my property in the town of R., namely, my dwelling-house and household furniture, and all things therein especially my car-horse and covered side cars," was held to pass bank notes known by the testator to be in the house at the time the will was made. The master of the rolls, in the course of his opinion, said: "It is also to be observed that there is no residuary clause in this will, and the court is disinclined to put such a construction on a will as will lead to an intestacy as to part of the property."

We have now referred to the cases cited by the learned counsel for the appellant in support of his contention, and it will be observed that in every case, excepting *Hotham v. Sutton* and *Michell v. Michell*, in which the court held that the general words preceding or following enumerated articles should not be limited to things *ejusdem generis*, they either occurred in a general bequest of the whole of testator's estate, in a residuary clause, or the will did not contain a residuary disposition. With the exceptions thus noted, it seems to be a settled rule of construction that when certain things named are followed by a phrase which need not but might be construed to include other things, it will be confined to articles of the same general character as those enumerated. (*Johnson v. Goss*, 128 Mass. 434; *Dole v. Johnson*, 3 Allen, 364; *Spark's Appeal*, 89 Penn. 148.)

Hotham v. Sutton (*supra*), recognizes and asserts this rule of construction, but held it not applicable there, because of an exception which manifested that the testator thought otherwise. In Jarman on Wills, 760, after considering various English decisions in which it was held that general words would not be limited to things *ejusdem generis*, the author said: "It is to be observed, however, that in all the preceding cases there was no other bequest capable of operating on the general residue of the testator's personal estate, if the clause in question did not. Where there is such a bequest, it supplies an argument of no inconsiderable weight in favor of the restricted construction which is there recommended by the

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anxiety always felt to give to a will such a construction as will render every part of it sensible, consistent and effective."

He alludes in that connection to *Woolcomb v. Woolcomb* (3 P. Wms. 112, Cox's ed.), where the testator bequeathed to his wife "all the furniture of his parsonage house, and all his plate, household goods and other goods (except books and papers), and all his stock within doors and without, and all his corn, wood and other goods belonging to his parsonage house," and gave the residue of his personal estate to J. S. The question was whether ready money, cash and bonds would pass to the wife? The court refused to give to the general words their broad meaning, but restricted them to goods *ejusdem generis*, inasmuch as a different construction would operate to frustrate the bequest of the residue.

Applying then the rule of construction deducible from the authorities, it may be conceded that if there were no residuary clause in the will so that as to the money and securities of the amount and value of twelve thousand dollars, Abelard Reynolds would have died intestate, unless it should be held to have passed by the bequest the words "and personal property in and upon the same or in any manner connected therewith" would be given the most comprehensive meaning of which they are susceptible for the purpose of preventing intestacy as to a portion of the estate. But there is a residuary clause. In the fifth provision the testator says: "I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, * * * in trust, to sell and dispose of the same and to convert the whole into money or into goods and safe securities," and after directing that out of the proceeds there should be paid to Sophia C. Strong and Mortimer F. Reynolds each such sum as added to their respective advancements will place them on an equality with the advancement made to Clara L. Amsden, he directed that the remainder be divided equally between his two granddaughters.

A case is, therefore, presented which requires the general words in the bequest to Mortimer F. Reynolds to be limited to things *ejusdem generis*. Such must be deemed to have been

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the intention of the testator. Indeed it is difficult to conceive that he could have intended otherwise, in view of the fact that it would have substantially resulted in a disappointment of the residuary disposition.

In the second subdivision of the will the testator bequeaths to his wife for use during her life "all household furniture, goods, carriages, harness and all other personal property other than money, choses in action and securities which shall be in or upon the premises at my said homestead or habitually kept there at the time of my decease." And the appellant insists that the omission to make a similar exception of "money, choses in action and securities" in the third subdivision must be taken as an indication of his intention to give to the words "personal property" therein their most comprehensive meaning. That fact is not controlling, but it is a circumstance to be considered in connection with the whole will in the effort to so construe it as to give effect to the intention of the testator. And our conclusion in that regard is in accord with the result reached by the learned surrogate.

The refusal to credit the executor with the sum of two hundred and fifty dollars donated to a commandery, of which testator was a member, for parading at the funeral, was not error. No reason is offered for this attempted charge against the estate. It does not appear that such sum or any other was required as a condition of participation on the part of the commandery. It was a mere gratuity on the part of the executor, which he then or subsequently concluded to permit the residuary legatees to assume.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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124	400
165	400

LUDLOW W. VALENTINE, an Infant by Guardian, Appellant, v.
SUSAN A. AUSTIN et al., Impleaded, etc., Respondents.

Where an action in which a *lis pendens* was filed has been dismissed and the notice canceled, it ceases to be a statutory notice to *bona fide* purchasers of the premises described in it. (Code Civ. Pro. §§ 1670, 1674.) In an action to set aside a deed from B., plaintiff's ancestor, to defendant R., also a deed from R. to defendant A., and a mortgage from the latter to defendant L., it was found that R. obtained his deed by fraud and undue influence, but that A. purchased in good faith relying on R.'s record title and possession. It appeared that a prior action was brought against R. to set aside a former deed of the premises from B. to him, on the same ground, in which action a notice of pendency was filed; a final judgment was entered therein dismissing the complaint, and said *lis pendens* was canceled by order of the court. It did not appear that A. knew of the former judgment. It was claimed that A. was chargeable with either statutory or implied notice of the infirmity of his title. *Held*, untenable; that the *lis pendens*, when canceled, ceased to be a statutory notice; and that the omission of A. or L. to search for the papers filed in that action was not negligence or evidence of bad faith on their part.

Reported below, 58 Hun, 398.

(Argued February 23, 1891; decided March 10, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 8, 1890, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Horace Secor, Jr., for appellant. Neither Mrs. Austin nor Mrs. Lunt needs equitable protection against plaintiff, because Richardt is responsible to Austin on his covenants, and Austin to Lunt on her bond. (*Gardner v. Schwab*, 110 N. Y. 650; *Armstrong v. Dubois*, 90 id. 95.) If this court hold that the facts found by the trial judge show constructive notice to the defendants Austin and Lunt, the finding that Mrs. Austin acted "without any notice of any infirmity," is unavailing to

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her. (*Green v. Roworth*, 113 N. Y. 462; *Waser v. First Nat. Bank*, 116 id. 492.) If the defendants Austin and Lunt are chargeable with constructive notice of the infirmity of Richardt's title, the fact that they acted in good faith and paid value, is no protection to them. (*Green v. Roworth*, 113 N. Y. 462; *Waser v. First Nat. Bank*, 116 id. 492; 1 Perry on Trusts, §§ 217, 223; *Valentine v. Lunt*, 115 N. Y. 501; *Weaver v. Barden*, 49 id. 286; *Miller v. McGuckin*, 15 Abb. [N. C.] 227; *Parker v. Conner*, 93 N. Y. 124; *Baker v. Bliss*, 39 id. 70; *Claffin v. Lenheim*, 66 id. 301; *Bennett v. Buchan*, 76 id. 386; *Griffith v. Griffith*, Hoff. Ch. 153; *Westervelt v. Hoff*, 2 Sandf. Ch. 98.) The defendants, through their attorneys who examined the title, are chargeable with notice of such suspicious, unusual and extraordinary circumstances, as would have caused a person of ordinary prudence to make further inquiries, which would have disclosed the true state of affairs. (*Parker v. Conner*, 93 N. Y. 124; *Tantum v. Green*, 6 C. E. Green, 364, 369; *Converse v. Blunrich*, 14 Mich. 109, 120; 4 Kent's Comm. 179; Wait's Fraud. Conv. [2d ed.] §§ 373, 374; *Griffith v. Griffith*, Hoff. Ch. 153; *Baker v. Bliss*, 39 N. Y. 70.) But even if these defendants can be held not chargeable with constructive notice, they are only entitled to the protection to the extent of the price paid. (*Valentine v. Lunt*, 115 N. Y. 502; *Weaver v. Barden*, 49 id. 286, 290, 300; *Cary v. White*, 52 id. 138, 141; *Spicer v. Waters*, 65 Barb. 227, 231; *Erschine v. Decker*, 39 Me. 467; *Partridge v. Chapman*, 81 Ill. 137; *Dunn v. Chambers*, 4 Barb. 381, 382.)

James D. Bell for respondent Austin. This court cannot review any question of fact arising herein because the evidence is not contained in the appeal book. (*Porter v. Smith*, 107 N. Y. 531; *Spence v. Chambers*, 39 Hun, 193; *Howland v. Howland*, 20 id. 472.) Mrs. Austin was protected as a purchaser in good faith without notice for value from a fraudulent vendee. (*Simpson v. Del Hoyo*, 94 N. Y. 189.) After a *lis pendens* is canceled a purchaser in good faith need not

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examine the pleadings, and is not bound by their allegation. (*Taylor v. Boyd*, 3 Ohio, 352; Bennett's Lis Pen. § 204; Code Civ. Pro. § 1674; *Miller v. McGucken*, 15 Abb. [N. C.] 204.) The defendant Austin is fully protected, and plaintiff has no right to redeem, she being a purchaser in good faith for value. (*Simpson v. Del Hoyo*, 94 N. Y. 189; *Bumpus v. Platner*, 1 Johns. Ch. 213; *Demarest v. Wynkoop*, 3 id. 129; *Griffith v. Griffith*, 9 Paige, 315; *Smart v. Bement*, 4 Abb. Ct. App. Dec. 253; *Paddon v. Taylor*, 44 N. Y. 371; *Valentine v. Lunt*, 115 id. 496, 505.)

W. C. Beecher for respondent Lunt. We must assume, for the purposes of this appeal, that the deed from Mrs. Valentine to Richardt was obtained by fraud. In that case plaintiff had his election, to ratify the sale and recover the money value of the property from Richardt, or disaffirm the sale and seek to set aside the deed and subsequent conveyances; obviously he cannot do both. (*Maller v. Tuska*, 87 N. Y. 168; *Rodemunde v. Clarke*, 46 id. 354; *Kinney v. Kiernan*, 49 id. 164). Where an appeal is taken on the judgment-roll alone without a case no question of law or of fact raised on the trial can be considered. (*Chubbuck v. Veinaen*, 42 N. Y. 432; *Ferguson v. Hamilton*, 35 Barb. 427; *Schwartz v. Webber*, 103 N. Y. 638; *Health Dept. v. Pardon*, 99 id. 237.) The court having found that Mrs. Valentine was sane, and remained so up to the time of her death, and that Mrs. Austin was a purchaser for value and without notice, and that Mrs. Lunt was a good faith mortgagee for value, these facts must be taken as conclusively established, and are not open for discussion. The conclusion necessarily follows that as to them this action must fail. (*Valentine v. Lunt*, 115 N. Y. 496.) It is contended that, notwithstanding Mrs. Austin and Lunt took in good faith and for value, yet they were chargeable with notice of the nature of the action brought in 1884, in which the complaint had been dismissed and the *les pendens* canceled by order of the court long before they or either of them took title. This is untenable. (*Miller v. McGucken*, 15 Abb. [N. C.] 204;

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Parker v. Conner, 93 id. 118; *Straus v. Gage*, 79 id. 102; *Lamont v. Chesire*, 65 id. 30; *Ayrault v. Murphy*, 54 id. 203; *Hayes v. Nourse*, 114 id. 595; *Simpson v. Del Hoyo*, 94 id. 189; *Jackson v. Henry*, 10 Johns. 184; *Magee v. Badger*, 34 N. Y. 247, 249; *Cupper v. Baumes*, 15 Hun, 136; 1 R. S. 756; *Pickert v. Canal Boat*, 55 How. Pr. 205; *Morgan v. Chamberlain*, 26 Barb. 163; *Ring v. Steel*, 3 Keyes, 450.)

FOLLETT, Ch. J. This action was begun January 20, 1888, to set aside a deed of June 7, 1886, from Catharine A. Valentine to defendant Hermann T. Richardt, on the grounds: (1) That at its date the grantor was of unsound mind. (2) That it was obtained from her without consideration, by fraud and undue influence; and also to set aside a deed of October 27, 1886, from Richardt to defendant Susan A. Austin and a mortgage of October 1, 1887, given by her to defendant Elisabeth H. Lunt, on the grounds: (1) That each of them had actual or statutory notice that Richardt acquired his title by fraud; or (2) That each of them had sufficient information of the circumstances under which he acquired his title to put them on inquiry, and having failed to inquire, notice to them of the fraudulent character of his title should be implied.

The court found that Mrs. Valentine was of sound mind on the 7th of June, 1886, and so remained until her death. But it was found that Richardt obtained his conveyance by undue influence and without consideration, and that the premises were then and ever since have been reasonably worth fifteen thousand dollars, and a judgment was ordered and entered against him for that sum with interest from the date of his deed, with costs. Richardt did not appeal from the judgment. The complaint against Mrs. Austin and Mrs. Lunt was dismissed on the merits and a judgment of dismissal entered with costs in favor of each of them against the plaintiff, from which he appealed to the General Term where it was affirmed with two bills of costs, from which affirmance he appealed to this court. Austin and Lunt in compliance with the rule of pleading in such cases (*Seymour v. McKinstry*, 106 N. Y. 230), alleged in

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their answers that the conveyance to each was for value, in good faith and without notice of any kind that Richardt's title was fraudulent.

A case not being annexed to the judgment-roll the only questions which are presented for discussion are those which arise on the plaintiff's exceptions to the conclusions of law of the trial court.

Upon the issues joined between the plaintiff and the respondents the court found that Mrs. Austin purchased the property from Richardt in good faith, relying upon his possession and record title, without notice of any infirmity therein. The plaintiff conceded that this purchase was made in good faith, and went so far as to request the court to find: "That the defendant Austin purchased said property from said Richardt in good faith, for \$12,000, relying upon his record title and possession." But he excepted to the sentence "without notice of any infirmity therein," which is the only finding to which an exception was filed, though exceptions were taken to all of the conclusions of law. As before stated, the evidence not being before the court, this finding so far as it is one of fact is conclusive, unless as the plaintiff asserts it is inconsistent with and overthrown by the other facts found. It is not found nor is it asserted that either of the respondents had actual notice that Richardt obtained his title by undue influence and without consideration, but it is asserted that both of them had either statutory or at least implied notice of the infirmity of his title.

It is found that November 22, 1883, Richardt obtained without consideration, by fraud and undue influence, a previous deed of this property from Mrs. Valentine, which was duly recorded the next day, and that in May, 1884, an action was begun in the City Court of Brooklyn, in the name of Catharine A. Valentine by Charles H. Joy, her next friend, against Richardt to set aside the deed as fraudulent, and as obtained by undue influence and without consideration. It is also found that on the 7th of May, 1884, there was filed in the office of the clerk of the county of Kings a notice of the

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pendency of that action, which was in the usual form, the title being given, and stating in substance that its object was to set aside the conveyance of November 22, 1883. It is further found that by a deed dated May 22, 1884, Richardt conveyed the premises to Mrs. Valentine, and December 20, 1884, a final judgment was entered dismissing the complaint in the last-mentioned action, and September 6, 1886, the *lis pendens* was canceled by an order of the court in which the action was brought. Before Mrs. Austin completed her purchase, she received an official search which disclosed the fact that the *lis pendens* referred to was filed May 7, 1884, and canceled September 6, 1886. A like search disclosing the same facts was furnished Mrs. Lunt when she took her mortgage. The learned counsel for the plaintiff insists that the *lis pendens* was constructive notice, by force of the statutes relating to *lis pendens*, to the respondents that the first deed from Mrs. Valentine to Richardt was obtained by fraud. When the action in which the *lis pendens* was filed had been dismissed and the notice canceled, it ceased to be a statutory notice to purchasers of the premises described in it. (Code Civ. Pro. §§ 1670-1674.) It is difficult to conceive of an effective notice of the pendency of an action when no action is pending.

It is further insisted that if the *lis pendens* was not a statutory notice, that the facts found were sufficient to put the respondents upon inquiry, and that they having failed to inquire, were negligent and notice should be implied.

It is not found that the respondents or their attorneys knew of the existence of the judgment which was entered in the action, or had any knowledge of the relations which are now found to have existed between Mrs. Valentine and Richardt. When the respondents found that the *lis pendens* had been canceled, it was not negligent or evidence of bad faith on their part not to search for the papers which had been filed in an action which had been dismissed. It is not affirmatively found that a complaint was ever filed in that action, but if one was and had been examined, it would have shown that the defendant Richardt was charged with having obtained a previous deed

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by fraud and undue influence, which, taken in connection with the dismissal of the action and the reconveyance of the property, would not be sufficient to authorize this court to hold, as a matter of law, despite the findings of fact referred to, that the grantee or mortgagee believed or had cause to suspect that Richardt's title was fraudulent, or that they were negligent in not making further inquiry.

The judgment should be affirmed with costs in favor of each respondent.

All concur.

Judgment affirmed. _____

WILLIAM P. WILLIS et al., v. AURELIUS S. SHARP, as Executor,
etc., THOMAS J. RICH, JR., as Receiver, etc., Appellant.

SAME v. SAME.

The rule that where a series of orders appointing receivers of the property of a debtor have been granted, if an earlier order becomes inoperative for any cause, the advantage of priority falls to those remaining in the order in which they were made, does not apply to a trust fund or to the estate of a deceased person, the disposition or distribution of which, when the rights of creditors are involved, is governed by law.

Where a receiver, appointed in an action, has paid out the fund in his hands in good faith and in obedience to orders of the court to parties not entitled thereto, he cannot be compelled to make restitution.

The will of S., after providing for the payment of debts, etc., gave all her estate to her executors, in trust for her son, with directions that they carry on some business for his benefit. One of the executors alone qualified, who continued to carry on a business in which the testatrix had been engaged. In so doing he incurred debts to plaintiffs for goods purchased. In an action brought by them against the executor, as such, a judgment was recovered, which the defendant was directed to pay out of the funds in his hands; which judgment was affirmed by this court (113 N. Y. 586). Pending the appeal to it an order was made appointing R. as receiver and directing defendant to transfer to him all the property of the estate in his hands; also directing said receiver to pay to plaintiffs the amount of said judgment, with interest and costs, and to hold the balance subject to the order of the court. Subsequently plaintiffs recovered another judgment, and by order the receivership was extended to the second action. C. thereafter recovered a judgment against defendant, as executor, whereby, after reciting the

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appointment of R. as receiver in the two former actions, it was adjudged that he, "after satisfying the obligations of the said prior receiverships," pay to C. the amount of his judgment. Pending an appeal from the order in plaintiffs' first action, orders were granted directing R. to pay out of the fund the amount of the second judgment; to retain sufficient to pay the first judgment during the pendency of the appeal therefrom, and to pay the balance on C.'s judgment. Which order R. complied with. The order in the first action was reversed (115 N. Y. 396), and thereupon R., paid to C. the balance in his hands, less his commissions and expenses. Subsequently, on motion of defendant, whereupon it appeared that S. was indebted, at the time of her death, to an amount largely exceeding the fund delivered to R., he was ordered to pay defendant the amount of the plaintiffs' first judgment, with interest from its date, and plaintiffs were ordered to refund to him the amount of their second judgment so paid to them, and the amount retained by the receiver for commissions, etc. *Held*, that while R. was protected so far as the payments were made by him pursuant to the orders, he had no specific directions to pay out the amount he had been directed to retain pending the appeal, as the direction in the order appointing him was defeated by its reversal; that the reversal did not authorize him to pay on the C. judgment the amount so retained, but he held it simply subject to the direction of the court; that while plaintiffs' judgments established their claims against the estate, they had no right to appropriate to their payment the estate of the testatrix to the exclusion of her creditors; that the sum they were entitled to was dependent upon a distribution to be made by the surrogate; that defendant was so far the representative of the creditors of the estate, that he could, and it was his duty to take steps to have the fund restored to him with a view to its proper distribution; that the receiver was properly directed to pay over the amount of the first judgment so retained by him, but was not chargeable with interest, save from the time he made the payment therefrom to C.; that plaintiffs were not entitled to apply upon their second judgment the money paid to them by the receiver, and were properly required to refund it, but were not required to pay to defendant the commissions, etc., of the receiver, as they were included in the sum which the receiver was directed to restore to plaintiffs.

(Argued February 23, 1891; decided March 10, 1891.)

APPEALS from an order of the General Term of the Supreme Court in the second judicial department, made December 8, 1890, which affirmed an order of Special Term, the substance of which is hereinafter stated.

Fida C. Sharp, the defendant's testatrix, by her will, which was admitted to probate in April, 1885, expressed her wish and

Statement of case.

direction that some legitimate business be carried on by the executors for the benefit of her son, and that her husband be the manager of it at a salary of \$1,500 per year. One of the persons nominated in the will as executor renounced, and letters testamentary were issued to the defendant alone, who was husband of the testatrix at the time of her death. He thereafter carried on the merchant tailoring business, and in doing so incurred liability to the plaintiffs for goods purchased. They brought the action first above entitled against him as executor, and in June, 1886, recovered judgment for debt and costs, \$1,393.42, and by it the defendant was directed to pay the judgment out of the funds and property of the estate of his testatrix. This judgment was affirmed (113 N. Y. 586). During the pendency of the appeal from the affirmance by the General Term of that judgment, and July 2, 1887, on motion of plaintiffs, an order was made by the Special Term appointing Thomas J. Ritch, Jr., receiver of the estate of the testatrix, and by it the defendant was directed to transfer to the receiver all the money credits and property of the estate; and it was ordered that out of the money the receiver pay to the plaintiffs or their attorney the amount of the judgment before mentioned, and that for costs entered on affirmance by the General Term, with interest from its date and ten dollars costs of the motion, and hold the balance of the money subject to the further order of the court. Pursuant to that order the defendant handed over to the receiver the entire fund of the estate, amounting to \$2,295.80. The plaintiffs on May 4, 1887, recovered another judgment in the action second above entitled against the defendant as executor for \$417.75, and on July 16, 1887, on motion of the plaintiffs an order was made by the Special Term appointing the same Mr. Ritch receiver in that action No. 2 of the estate of defendant's testatrix, and ordering the receivership in action No. 1 to be extended to the other; and that upon the performance of his duties under the prior appointment, the receiver pay the plaintiffs the amount of the judgment in action No. 2, with interest from its date and ten dollars costs of motion, and

Statement of case.

hold balance of the fund subject to the further order of the court. In February, 1888, John D. Cutter and another recovered a judgment against the defendant as executor of upwards of \$1,500, whereby, after reciting that Ritch had been so appointed in the two former actions, it was adjudged that the receiver, "after satisfying the obligations of said prior receiverships, pay to the plaintiffs, or to their attorney in this action, the amount of the judgment * * * with interest from its date." The defendant appealed from the order made in action No. 1, and it was reversed October 8, 1889 (115 N. Y. 396). In the meantime and in June, 1888, an order was made on plaintiff's motion directing the receiver to pay out of such fund to the plaintiffs the amount of the judgment in action No. 2, with interest and motion costs. And on the same day an order was made directing him to pay on the Cutter judgment to its extent after paying judgment and costs in action No. 2, and further directing the receiver to retain in his hands during the pendency of the appeal to the Court of Appeals from the judgment in action No. 1, the amount of the principal sum of that judgment; and that he should not during that time pay such amount so directed to be retained to the plaintiffs in the latter judgment. On September 5, 1888, the receiver paid to the plaintiffs' attorney \$494.17 on account of judgment and costs in action No. 2; and on the same day he paid to the plaintiffs' attorney on account of the Cutter judgment, \$408.21. The sum of these two payments was all of the funds in his hands, except the amount he was so directed to retain. Afterwards and on the day the order in action No. 1 was reversed by the Court of Appeals (October 8, 1889), he paid to plaintiffs on the Cutter judgment the balance remaining in his hands, less \$229.75 retained for his expenses and commissions as receiver.

By the order made August 8, 1890, and which is the subject of this review, it was ordered that the receiver pay to the defendant, or his attorney, the amount of the first judgment in action No. 1 (\$1,393.42), and that for costs on its affirmance by General Term (\$76), and interest on both of them from the

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time of their entry respectively; and that the plaintiffs pay to the defendant, or his attorney, the amount of the judgment in action No. 2 (\$417.75), with interest from its date of entry, and the sum of \$229.75 commissions and expenses of the receivership with interest from September 5, 1888, and ten dollars costs of the motion. The receiver and the plaintiffs respectively appealed from this order to the General Term, and on its affirmance they in like manner appealed to this court.

Walter S. Logan for appellant. That section of the Code of Civil Procedure providing for an order of restitution, where a judgment or order has been reversed or set aside, does not justify the order in this case. (Code Civ. Pro. §§ 1292, 1323.)

Alexander V. Campbell for respondents.

BRADLEY, J. The receiver claims that he paid out the fund in good faith and in obedience to orders directing him to do so. If that contention is sustained by the facts, the claim as against him for restitution cannot be supported. He received the fund pursuant to the order made in action No. 1 appointing him as such, and directing the defendant to hand it over to him, and he made the payments of September 5, 1888, of \$494.17 on account of plaintiffs' judgment in action No. 2, and \$408.21 on the Cutter judgment in obedience to the direction in orders of the court, and by them he was protected in so doing. But the amount which he was directed to retain during the pendency of the appeal from the judgment in action No. 1, he had no specific direction to pay out except that given by the first order to pay it on the last-mentioned judgment; and the purpose of that direction was defeated when such order was reversed by the Court of Appeals. It is, however, urged that on such reversal the adjudication in the Cutter judgment and the order to make payment upon it remained effectual and opened the way for the payment of the balance in his hands upon that judgment, but it may be

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observed that the adjudication there was that the receiver pay the judgment "after satisfying the obligations of the prior receiverships," and that the order directed him to retain the amount of the principal of the first judgment during the pendency of the appeal from it to the Court of Appeals; and it evidently was contemplated that in case it was affirmed, such amount might become applicable to payment upon it. There was never any direction to otherwise pay it out. That judgment was affirmed, and as such remained effectual; and afterwards on reversal of the order he held the balance so retained subject to direction of the court, but without applying to the court for further instructions he paid it on the Cutter judgment. In this the receiver was justified if the plaintiffs in that judgment were entitled to it. It is insisted they were, because their judgment declaring their right to payment out of the funds of the estate, and the order before mentioned recognizing such right remained undisturbed. This judgment as well as those preceding it established the claims of the plaintiffs as against the estate, and were charges upon it to the extent which the law would enable them to enforce them and obtain satisfaction. It appeared in the papers upon which the order under review was made, that there were creditors of the testatrix having unpaid claims amounting to ten thousand dollars. These judgment creditors, whose debts were created subsequently to her death, had no right in exclusion of her creditors to appropriate to the payment of their claims the entire amount of the estate of the testatrix, and how much of the fund they could eventually receive was dependent upon the distribution which the surrogate should direct after opportunity given to the creditors of the decedent to be heard. This was held in *Willis v. Sharp* (115 N. Y. 396), upon reversal of the order. No greater right than that was established by the judgments or derivable from the orders. And the fact that the Cutter judgment and the orders in that case and in action No. 2 remained unreversed, was not in the way of inquiry by the court into the situation and its determination that they were not entitled to the money. They had an

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absolute right to seek and obtain preference as against him personally, who was executor, for debts created by him after the death of his testatrix, but the fund belonging to her estate was held by him for all the creditors whose claims were properly chargeable upon it; and those parties had no right to make available to themselves a preference in the manner they sought to assert it. These views do not proceed upon the ground that the reversal of the order in the first action had any effect upon the existence of the judgment and order in the Cutter case or of the order in the second action. The question differs in that respect from that which would exist in case of a series of orders appointing receivers of the property of a debtor in behalf of his creditors. Then if the earlier orders became inoperative for any cause, the advantage of priority might fall on those remaining in the order of time which they are made. But that rule is not applicable to a trust fund, or the estate of a deceased person, the disposition or distribution of which, when the rights of creditors are involved, is governed by law, which the trustee cannot effectually disregard. While the executor could not afford any right to these parties by his consent, he was so far the representative of the creditors that he could take steps to restore the fund to its proper depository, and it was his duty to do so, with a view to its distribution through the action of the tribunal having jurisdiction of the subject of the administration of the personal estate of deceased persons; and whatever rights the plaintiffs in those judgments have in the fund must be ascertained and taken through the exercise of that jurisdiction. It follows that they had no legal right to appropriate the fund in question through the receivership sought to be created; and that the receiver was, no further than he was by orders of the court directed to do so, justified in paying over to them the moneys which came to his hands. No satisfactory reason appears for charging him with interest upon the \$1,393.42 from the time of entry of the judgment for that amount, or with the costs of the General Term, as he had the direction of the court to pay over the entire fund in his hands

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except the sum last mentioned. The conclusion also follows that the plaintiffs were not entitled to the money paid to them by the receiver. While the order permitted them to receive the money, the court properly determined that it established no right to its appropriation by them to the payment of the judgment. It is suggested by their counsel that the motion and order under review were made in action No. 1 only, and, therefore, restitution of money received in No. 2 could not properly be directed in the order. The general rule goes in support of that contention, but in the present case the parties and their attorneys are the same in both actions, and all the facts are presented by the depositions and papers upon which the motion was heard. It does not appear that any such question was raised in the court below, and under such circumstances the objection now taken is not available. But we see no reason why the plaintiffs should be required to pay to the defendant the commissions and expenses of the receiver. The money retained by the receiver pursuant to the order of the court until he made the last payment to the plaintiffs in the Cutter judgment, embraced the amount of those commissions and expenses, and they were included in the sum which he is directed to restore to the defendant.

The order as against the receiver should be so modified as to require him to pay only \$1,393.42 and interest thereon from October 8, 1889. And as against the plaintiffs, it should be so modified as to order them to pay only the sum of \$494.17 and interest thereon from September 5, 1888, and as so modified the order as to such parties respectively should be affirmed.

All concur.

Ordered accordingly.

194	414
132	164
124	414
161	226
j 162	26

SOPHIA OLDENBURG et al., Administratrix, etc., Respondents,
v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD
COMPANY, Appellant.

In an action to recover damages for alleged negligence causing the death of O., plaintiffs' intestate, it appeared that O. was going south upon the west sidewalk of a city street running north and south, which is crossed by the three tracks of defendant's railroad; the space between the middle and the south track is seven feet. At the crossing there were safety-gates, which were down as O. approached. When they began to rise he went on; he could see nothing south or west as he approached the middle track, his view being obstructed by cars standing thereon, one of which reached half across the sidewalk and projected two feet beyond the rails. O. passed out from behind this car into the space between the middle and south track and was struck by the cross-beam of the tender to a locomotive on the latter, which was backing from the west; the cross-beam projected two feet beyond the track, thus leaving a space of but three feet between it and the car. O. had no knowledge of the locality; he was walking fast with his head down, the sidewalk being rough; he did not look toward the west as he passed beyond the car; the bell on the locomotive was not rung; the gateman had begun to lower the south gate, which was half-way down when the accident happened; he shouted to O. who paid no attention. *Held*, that the question of contributory negligence was properly submitted to the jury; that it could not be held, as matter of law, that O., hearing no bell and conscious of no danger, was bound to look to the west the instant he passed beyond the car; that while bound to use his eyes he was not bound to use them in a particular manner or at a particular instant of time; also that it was a question for the jury as to whether he heard the call of the gateman. *Woodard v. N. Y., L. E. & W. R. R. Co.* (106 N. Y. 369); *Young v. N. Y., L. E. & W. R. R. Co.* (107 id. 500), distinguished.

(Argued February 24, 1891; decided March 10, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made October 17, 1890, which affirmed a judgment in favor of plaintiffs entered upon a verdict and denied a motion for a new trial.

This action was brought to recover damages for alleged negligence in causing the death of Charles Oldenburg, plaintiffs' intestate.

The facts are stated in the opinion.

Opinion of the Court, per VANN, J.

James F. Gluck for appellant. It was error to submit the questions of negligence in this case to the jury. The court should have nonsuited the plaintiff or directed a verdict in favor of the defendant. (*Becht v. Corbin*, 92 N. Y. 670; *Biesegal v. N. Y. C. & H. R. R. Co.*, 40 id. 9; *Harty v. N. Y. C. & H. R. R. Co.*, 42 id. 468; *Cordell v. N. Y. C. & H. R. R. Co.*, 70 id. 119; *Woodard v. N. Y., L. E. & W. R. R. Co.*, 106 id. 369; *Young v. N. Y., L. E. & W. R. R. Co.*, 107 id. 500; *McDonald v. L. I. R. R. Co.*, 116 id. 546.) A man cannot absolutely rely upon the assumption that the defendant will perform its duty, and so relying, disregard entirely all care for his own safety. (*Ernst v. H. R. R. Co.*, 39 N. Y. 61; *Wilcox v. R. R. Co.*, 39 id. 358; *Grippen v. N. Y. C. R. R. Co.*, 40 id. 34; *Havens v. E. R. R. Co.*, 41 id. 296; *Young v. N. Y., L. E. & W. R. R. Co.*, 107 id. 500; *Palmer v. N. Y. C. & H. R. R. Co.*, 112 id. 234; *Adolph v. C. P. R. Co.*, 76 id. 553; *Cordell v. N. Y. C. & H. R. R. Co.*, 70 id. 119.)

Isaac S. Signor for respondents. There being evidence on which the jury could render their verdict, the Court of Appeals will not review it. (*Finney v. Gallaudet*, 30 N. Y. S. R. 194; *Greany v. L. I. R. R. Co.*, 101 N. Y. 420.) The evidence establishes conclusively that the defendant was negligent. (*Glusshing v. Sharp*, 96 N. Y. 676; *Lindeman v. N. Y. C. & H. R. R. Co.*, 3 N. Y. S. R. 731; *Callaghan v. D., L. & W. R. R. Co.*, 22 id. 594; *Phillips v. N. Y. C. & H. R. R. Co.*, 25 id. 91; *Feeney v. L. I. R. R. Co.*, 116 N. Y. 375; *Ryan v. N. Y. C. & H. R. R. Co.*, 37 Hun, 186.) It is not a case where it was necessary to plead the ordinance of the city as to speed of trains, as the action was not based on the ordinance. (*Archer v. N. Y. C. & H. R. R. Co.*, 106 N. Y. 602; *Van Radden v. N. Y. C. & H. R. R. Co.*, 30 N. Y. S. R. 300; *Dawson v. Sloan*, 17 J. & S. 304.)

VANN, J. Chicago street, in the city of Buffalo, runs substantially north and south, and is crossed at right angles by

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three railroad tracks operated by the defendant. The distance from the north rail of the north track to the south rail of the south track is twenty-eight feet and five inches. Each of the tracks is four feet eight and one-half inches between the rails. It is seven feet three and one-half inches from the south rail of the north track to the north rail of the middle track, and seven feet from the south rail of the middle track to the north rail of the south track. There are safety gates at this crossing, fifty-one feet and six inches apart, operated by a gateman stationed at the south-west corner. On each side of the street is a sidewalk substantially six feet wide and the distance from one sidewalk to the other is about fifty feet. The west sidewalk between the gates is also crossed by two switch tracks, one north and the other south of the main tracks already mentioned, and extending about half way across the street before they are merged in the outer main tracks.

On the 15th of September, 1888, at about one o'clock in the afternoon, Charles Oldenburg, the plaintiffs' intestate, a man of mature years, was walking south on the west side of Chicago street, and as he approached this crossing, the gates were down to enable a passenger train of four or five coaches to pass toward the west on the north track. He stopped until the last car had crossed, and as the gates began to rise, he went on. At the same time a team started to cross from the south, the gateman having shouted to it to go ahead. It went very slowly. Until Oldenburg had passed over the middle track, he could see nothing south thereof and west of the sidewalk on which he was walking, because his view in that direction was cut off by fifteen passenger coaches standing on the middle track and extending westward for a block and a half. The most easterly of these coaches reached half way across the west sidewalk and projected two feet beyond the rails of the track upon either side. Thus his view to the south-west was shut off until he had passed by the end of the coach, which would place him at a point two feet south of the middle track. Until he reached this point, which was only five feet from the south track, he could see substantially no part of that track

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west of the sidewalk. As he reached this point, walking rather fast and having no knowledge of the locality, a locomotive with a tender attached was almost upon him, backing eastwardly on the south track at the rate of ten miles an hour. The bell was probably ringing, but the passenger train was not out of hearing and there was some confusion of sounds. Had he stopped and looked toward the west at the instant that he reached the said point, he could have seen the danger in time to avoid it, but less than two steps forward brought him in contact with the cross-beam of the tender, which projected about two feet beyond the rails of the track on each side, and he was thrown under the wheels and killed. He did not look toward the west at the critical moment when he could have seen the engine, but went with his head down, as if looking at the sidewalk, which was rough, and the planks composing it very uneven. The gateman had begun to lower the south gate, and it was half way down when the accident happened. As he was lowering the gate, he shouted to the deceased who paid no attention, and whether he heard or not was a question of fact, under the circumstances. The space between the middle and south tracks, where Oldenburg could have stood without danger from the passenger coach behind or the advancing tender in front, was only three feet long. In order to reverse this judgment, it is necessary to hold that, notwithstanding the peculiar facts surrounding him, he was bound, as matter of law, while passing over this distance of three feet, to look to the west so as to see the engine, or else to look in front of him and up high enough to see the gate as it began to fall. We do not think that the law required this, but agree with the courts below in holding that the question of contributory negligence, under all the circumstances, was one of fact for the jury and not of law for the court.

The deceased did not enter upon the crossing until the flagman had not only given a signal of safety by raising the gates, but had also shouted to the team in waiting to go ahead. Whether he heard the shout or not, the open gate was virtually an invitation to him to proceed and the team crossing slowly

Opinion of the Court, per VANN, J.

was in plain sight and would naturally add to his confidence. As said by this court in a recent case: "The raising of the gate was a substantial assurance to him of safety, just as significant as if the gateman had beckoned to him or invited him to come on, and that any prudent man would not be influenced by it is against all human experience." (*Glushing v. Sharp*, 96 N. Y. 676.) Or, as laid down in a still later case: "The open gate was an affirmative and explicit declaration and representation that neither train nor locomotive was approaching with intent to pass." (*Palmer v. N. Y. C. & H. R. R. Co.*, 112 N. Y. 234, 241.)

While the deceased had the right to rely to a certain extent upon the assurance thus given by the defendant that it was safe for him to go on, it was still his duty to be on the lookout for danger, and to exercise the same care that a man of ordinary prudence would have exercised under the same circumstances. The degree of care depended upon his knowledge of the situation, or upon those facts that he would have discovered by the use of ordinary vigilance. It does not appear that he had ever seen this crossing before, or that he knew anything about it, except what he observed on the occasion when he met his death. In this respect, as well as by the implied invitation to proceed arising from the use of safety gates, this case is easily distinguished from those relied upon by the defendant. (*Woodard v. N. Y., L. E. & W. R. R. Co.*, 106 N. Y. 369; *Young v. N. Y., L. E. & W. R. R. Co.*, 107 id. 500.)

It is claimed that he should have looked to the right, so as to see the approaching engine, and in front, so as to see the descending gate, but can it be held as matter of law that he had time for this, and also to use due care in other respects? According to the evidence, not more than nine or ten seconds elapsed after the passenger train had gone by on the north track before the engine came down on the south track. During this short period he proceeded to cross, passed over two tracks, reached the third where he could not safely stop, because at any time the passenger coaches standing there

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might back down upon him, went on two feet further, where the strip three feet long would have afforded safety if he had known it, took one step more, and in the language of a witness, "just as he gave the second step he was whirled around and pitched headforemost." Can the court say that, knowing nothing of his surroundings, he was bound to look in any particular direction while, hearing no bell and conscious of no danger, he took one step and a part of another? How long is a rapid walker in taking a single step? How much time was there for reflection or action? Even if he had stopped walking, how could he have decided on the instant just where it was safe for him to stand between the tracks? It was his privilege to look down upon the rough walk so as to avoid danger there, and the evidence warranted the jury in finding that he did so. It was his duty to look to the east where there was no obstruction in sight, but while he was bound to use his eyes, we cannot say that he was bound to use them in a particular manner, at a particular instant of time. We think that it was for the jury to take into consideration all the circumstances and decide whether he exercised such care as could reasonably be required of one in his situation and with his knowledge. (*Greany v. Long Island R. R. Co.*, 101 N. Y. 419; *Sherry v. New York Central, etc., R. R. Co.*, 104 id. 652, 657.)

As this is the only question, properly raised by exception, that has been discussed by the learned counsel for the defendant, the judgment should be affirmed with costs.

All concur.

Judgment affirmed.

Statement of case.

**THERESA WIWIROWSKI, as Administratrix, etc., Respondent, v.
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COM-
PANY, Appellant.**

While want of contributory negligence, on the part of a person killed at a railroad crossing, may be established by inferences drawn from the circumstances, such an inference may not be drawn simply from a presumption that a person exposed to danger will exercise care and prudence in regard to his own safety.

In an action to recover damages for alleged negligence causing death, freedom of contributory negligence must be proved, and where the circumstances point as much to the negligence of the deceased as to its absence, or point in neither direction, a refusal to nonsuit is error.

The fact that another person who was in company with the deceased looked and listened, but did not hear or see the approaching train, does not establish that he would have failed also had he looked and listened.

In an action to recover damages for alleged negligence, causing the death of W., plaintiff's intestate, it appeared that W., while passing along a city street, in attempting to cross one of defendant's tracks, was struck and killed by the tender of a locomotive which was backing down on the track drawing a caboose. It was dark at the time, but quiet, and lights were burning in the cupola of the caboose; W. had crossed over three tracks before reaching the one where the accident occurred; some cars were standing on the first track which came within about twenty feet of the street. This track is about fifty feet distant from that on which W. was killed; the latter is straight for a long distance each way from the street. No evidence was given tending to show that W. looked or listened before reaching defendant's tracks; plaintiff, his wife, who was following closely behind him, testified that she looked and listened when she first approached the tracks, but saw no light or car approaching. *Held*, that the evidence failed to show want of contributory negligence; and that a refusal to nonsuit the plaintiff was error.

Wiwrowski v. L. S. & M. S. R. Co. (58 Hun, 40), reversed.

(Argued February 24, 1891; decided March 10, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 23, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict and denied a motion for a new trial.

124	420
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124	420
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124	420
e 78	AD*406

Statement of case.

This action was brought to recover damages for alleged negligence causing the death of Dazydeury Wiwirowski, plaintiff's intestate.

The material facts are stated in the opinion.

James F. Gluck for appellant. The plaintiff failed to establish a cause of action, and freedom from negligence on the part of the defendant was shown by a preponderance of evidence. (*Reynolds v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 248; *Cordell v. N. Y. C. & H. R. R. Co.*, 75 id. 330; *McDonald v. L. I. R. R. Co.*, 116 id. 546; *Hoag v. N. Y. C. & H. R. R. Co.*, 111 id. 199; *Briknell v. N. Y. C. & H. R. R. Co.*, 120 id. 290.)

Frank R. Perkins for respondent. The question of defendant's negligence was properly submitted to the jury. (*Merwin v. M. R. Co.*, 48 Hun, 609; *Daniels v. L. I. R. T. Co.*, 28 N. Y. S. R. 87; *Wall v. D. L. & W. R. R. Co.*, 28 id. 132.) It cannot be said that the fact that there was contributory negligence on the part of the plaintiff's intestate was proved so clearly that there was nothing for the jury to determine, and it became a question of law. (*Galvin v. New York*, 112 N. Y. 223; *Palmer v. Dearing*, 83 id. 7; *Howrney v. B. C. R. R. Co.*, 27 N. Y. S. R. 49; *Beckwith v. N. Y. C. & H. R. R. R. Co.*, 28 id. 130.) The question as to the intestate's being a trespasser on the defendant's tracks was properly submitted to the jury. (*Elwood v. W. U. T. Co.*, 45 N. Y. 549; *Hackford v. N. Y. C. & H. R. R. R. Co.*, 53 id. 654; *Smith v. Carr*, 55 id. 678; *Hayne v. Blair*, 62 id. 19.) The intestate was not bound to see or hear the train, but in the exercise of reasonable care and prudence to look and listen. This may be shown in various ways from the circumstances, or there may be such an inference of reasonable caution as will require a submission to the jury (*Johnson v. H. R. R. R. Co.*, 20 N. Y. 68; *Greany v. L. I. R. R. Co.*, 101 N. Y. 422; *Sherry v. N. Y. C. & H. R. R. R. Co.*, 104 id. 652; *Hart v. H. R. B. Co.*, 80 id. 623; *Galvin v. City of New York*, 112 id. 228;

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Buhrens v. D. D. R. R. Co., 53 Hun, 572; *Young v. N. Y., L. E. & W. R. R. Co.*, 107 N. Y. 500; *Woodward v. N. Y., L. E. & W. R. R. Co.*, 106 id. 369.) The general verdict for the plaintiff, by intendment of law, settled in favor of the prevailing party every question of fact litigated upon the trial, and the court will not intend that the jury found either of the issues in favor of the unsuccessful party for the purpose of overturning the verdict. (*Wolf v. G. F. Ins. Co.*, 43 Barb. 405; *Van Pelt v. Otter*, 2 Sweeny, 206; *Rhodes v. Bunts*, 21 Wend. 19.) The question as to whether the bell was rung was litigated on the trial and properly submitted to the jury. (*Greany v. L. I. R. R. Co.*, 101 N. Y. 422; *Sipple v. State*, 99 id. 290; *Dean v. M. E. R. Co.*, 119 id. 550; *Kearney v. Mayor, etc.*, 92 id. 621.) There was sufficient evidence in the circumstances of the absence of any contributory negligence on the part of the plaintiff's intestate to require the submission of that question to the jury. (*Johnson v. H. R. R. R. Co.*, 20 N. Y. 74; *Galvin v. Mayor, etc.*, 112 id. 228; *Palmer v. Dearing*, 93 id. 7; *Hoffman v. U. F. Co.*, 47 id. 186; *McGovern v. N. Y. C. & H. R. R. R. Co.*, 67 N. Y. 421; *Dolan v. D. & H. C. Co.*, 71 id. 228; *Blaiser v. N. Y., L. E. & W. R. R. Co.*, 17 N. Y. S. R. 145; *Tucker v. N. Y. C. & H. R. R. R. Co.*, 33 id. 863; *Parsons v. N. Y. C. & H. R. R. R. Co.*, 113 N. Y. 355.)

HAIGHT, J. On the evening of October 27, 1888, at about half-past six or seven o'clock, the plaintiff, with her husband and a neighbor named Jacobowski, were walking across the defendant's tracks along the southerly sidewalk of Oneida street in the city of Buffalo. They first approached the tracks of the New York Central railroad, three in number, which they passed in safety. They then entered upon the defendant's west-bound track, and whilst attempting to cross that the two men were struck by the tender of a locomotive and killed. The locomotive was backing into the city from East Buffalo, drawing a caboose. On the first of the Central tracks some cars were standing which came to within about twenty

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feet of Oneida street. A passenger train had just passed east on the Central tracks, the rear lights of which were at Montgomery street, the next street east of Oneida street, as the defendant's engine passed that street. At the time of the accident it was dark, and there was a conflict in the evidence as to whether the usual signals were given, making the question of the defendant's negligence one for the jury.

The only question which we are called upon to consider pertains to the contributory negligence of the plaintiff's intestate. Upon this branch of the case the testimony given in support of the verdict was by the plaintiff, and is as follows: "The two men went ahead of me, and I went behind them. When we came to the railroad tracks I did not see any car or hear any noise. A car came along and killed my husband and the other man with him, and then I fell down and don't know what after that happened. We were on the sidewalk on Oneida street when the car hit them. I was about three feet behind the men at the time. I did not see any flagman or hear anyone call to me, nor hear any bell or whistle, or see any light. I saw the men after the car had passed over them. It was dark at that time." On her cross-examination she testified that "We went along quiet; we were not talking. Everything was quiet all around there; all the way in. Alongside the tracks were some cars, on which one of the tracks I can't exactly tell. My best recollection is they were on the first track we passed, about twenty feet back from Oneida street, and it was on the fourth track after we passed the first track that my husband was killed. We walked along on this space and down on the other side of these cars. We came right down across the tracks and my husband was struck on the fourth track." After the plaintiff had rested the defendant's counsel requested the court to direct a verdict upon the ground that the plaintiff had failed to make out a cause of action. The court reserved its decision and permitted the plaintiff to be again recalled to give further testimony. She was then asked how she knew that there were no lights, and answered that she noticed that there were none. And when asked how did she

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notice it, answered "I looked at one side and the other, looked each way. I saw no light or any car. I didn't see any car coming." This was all of the evidence given on behalf of the plaintiff bearing upon the question. It will be observed that she says that she looked "when we came to the railroad tracks." From this we understand that she looked as they came to the first of the Central tracks. The defendant's track, upon which her husband was killed, was the fourth track, a distance of about fifty feet from the first of the Central tracks. It does not appear that she looked or listened after this time but followed along about three feet behind her husband and his companion until they were struck. At the place of the accident the tracks of the defendant were straight for a distance of 1850 feet east and 3200 feet west. No evidence was given tending to show whether the plaintiff's intestate looked or listened before entering upon the defendant's tracks.

The trial court appears to have been of the opinion that the testimony of the plaintiff as to the observations made by her were sufficient to excuse her husband from the exercise of the care and prudence that the law called for under such circumstances. If this were the rule it would hardly answer in this case, for her own statement does not show that she exercised vigilance or even ordinary care in the use of her eyes and ears in approaching the defendant's track. True, she looked both ways and saw nothing when she first approached the tracks, but had she again looked and listened after she had crossed the first two or three tracks she might have discovered the approach of the defendant's train. It was running at a speed of between four and five miles per hour. The lights in the cupola of the caboose were burning, and even though there was no light upon the rear of the tender, or bell sounded, she might have heard the tread of the train as well as have seen the approaching lights in the caboose.

But we do not understand that vigilance or care upon the part of the plaintiff relieved her husband from himself exercising care and prudence. The fact that she looked and saw nothing may be some evidence tending to show that he could

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not have seen had he looked, provided his chances for observation were the same as hers. It does not, however, follow that because she failed to see and hear he would have failed also had he looked or listened. It is undisputed that after passing the first of the Central tracks there was nothing to obscure the vision, other than the darkness that prevailed, for a long distance, and there was nothing to obstruct the sound. She was walking closely behind the two men, within three feet. Their bodies to some extent might have obscured her vision as they were approaching the defendant's track. Their opportunity to see and hear was, therefore, better than hers. They were in a known place of danger, and had they exercised their senses under the circumstances it is at least probable that they would have both seen and heard the approaching train. Freedom from contributory negligence cannot be assumed. (*McDonald v. Long Island Railroad Co.*, 116 N. Y. 546-550; *Dobbins v. Brown*, 119 id. 188.)

The burden of showing that the plaintiff's intestate was free from contributory negligence rested upon the plaintiff. It is true that the want of negligence may be established from inferences which may be properly drawn from the surrounding facts and circumstances, as in the case of *Galvin v. Mayor, etc.* (112 N. Y. 223). But such inference cannot be drawn from a presumption that a person will exercise care and prudence in regard to his own life and safety, for the reason that human experience is to the effect that persons exposed to danger will frequently forego the ordinary precautions of safety. And when the circumstances point as much to the negligence of the deceased as to its absence, or point in neither direction, a nonsuit should be granted. (*Cordell v. N. Y. C. & H. R. R. Co.*, 75 N. Y. 330. See also *Reynolds v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 248; *Hoag v. N. Y. C. & H. R. R. Co.*, 111 id. 199; *Bond v. Smith*, 113 id. 378.)

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

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Statement of case.

GEORGE COCKS et al., Respondents, v. PHEBE C. HAVILAND,
Appellant.

The mere fact that one of two or more executors or trustees is passive, and does not participate in the administration or interfere with the acts of his co-executors in taking possession of the property and collecting moneys of the estate, will not charge him with liability for waste by them; it must appear that he had some reason to apprehend that such might be the consequence of their acts.

Defendant was one of six executors of a will; letters testamentary were issued to all; two of them, C. & B., took charge and possession of the estate and assumed to administer it. No portion of the assets came into defendant's hands, except what she received as the share of the residuary estate given her by the will, and she took no active part in the management. The will directed that the share of D., one of the beneficiaries and also one of the executors, should be invested by the executors upon bond and mortgage, the income applied during his life to the support of his family, and on his decease the share to go to plaintiffs, his children. C. & B. divided the estate into shares as directed, and paid over to the beneficiaries, except D., their shares. At that time all of the beneficiaries were present. The property apportioned and set apart, as the share of D. was examined by him and handed over to B. to care for. It was not invested as directed by the will, but was misappropriated by C. & B. who were copartners. About eight years after the issuing of letters testamentary they failed. It did not appear that up to the time of the failure there was anything to excite suspicion that they were not prudent and reliable business men. In an action brought by plaintiffs to recover said share, *held*, that the fact did not justify a finding of such negligence, on the part of the defendant, as to render her liable.

The will directed an investment for the testator's widow. The investment was not made by C. & B. as directed, but in another security. Defendant remonstrated against this at the time, but took no action to compel a proper investment; no loss resulted therefrom. Four years before the failure of C. & B., defendant knew that they had not made any other investment of the fund, and she then joined in an undertaking to the widow that her annuity should be paid. *Held*, that these facts were not sufficient to charge defendant with the want of due care and caution.

Earle v. Earle (93 N. Y. 104); *Remington v. Walker* (99 id. 626), distinguished.

(Argued February 26, 1891; decided March 10, 1891.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 18, 1890, which affirmed a judgment in favor of plaintiffs entered upon the report of a referee made pursuant to an interlocutory judgment.

In June, 1868, John Cocks died leaving his will, which was shortly after admitted to probate, and by it he directed the executors to invest such sum upon bond secured by mortgage on real estate in Westchester county as would net an income of \$1,000 per year, to be paid to his wife Adelia semi-annually so long as she should remain his widow, unmarried and no longer, in lieu of dower.

He gave to his daughter Anna \$3,000. The residue of his property he gave and devised to his five children, David Cocks, Harrison Cocks, Phebe C. Haviland, Mary Barlow and Anna Cocks, with direction that the share of his son David should be invested in real estate or upon bond and mortgage by the executors and the income be applied to the support of him, his wife and children during his life, and on his decease such share to go to the children of David. He empowered the executors to sell his property, real and personal, and appointed his wife, his five children before mentioned and his sons-in-law Daniel E. Haviland and George J. Barlow, the executors of his will. Letters testamentary were issued to all of the persons so appointed by the will. David Cocks died in 1881, leaving the plaintiffs, his children, surviving him. The one-fifth of the residuary estate given for the benefit of David and his family was not invested as directed by the will, but all of it, except \$1,500 was appropriated by Harrison Cocks and Barlow, two of the executors, to their own use, and in 1876 they failed and were thereafter insolvent. This action was brought in 1889 to recover the share which by the will the plaintiffs were to take on the death of their father. And while all the surviving executors were named as parties defendant in the summons, service was made only upon the appellant and Daniel E. Haviland, her husband. As to the latter, the complaint was dismissed, and by the interlocutory judgment it

Statement of case.

was determined that the appellant should pay to the plaintiffs the amount to which by the will they were entitled, and to ascertain what that was a reference was ordered, and the referee reported that the residuary estate amounted to \$106,391.60, and that one-fifth of it (less the \$1,500), and interest from the time of David's death to date of the report, amounted to \$28,590.46. The report was confirmed and judgment for that sum directed and entered against the defendant.

Further facts are stated in the opinion.

Thomas Nelson for appellant. A conclusive bar to the maintenance of this action is that the claims for which this suit is brought have already been tried and adjudged by a competent tribunal in the proceeding before the surrogate of Westchester county, in which he made his decree. (*Embury v. Connor*, 3 N. Y. 522; *In re Hood*, 90 id. 512; *In re Niles*, 113 id. 556; *O'Connor v. Higgins*, Id. 516.) Independent of the prior adjudication conclusively absolving Mrs. Haviland from any liability to the plaintiffs in this case, the evidence exonerates her, and the court erred in charging her. (*McCabe v. Fowler*, 84 N. Y. 318; *Adair v. Brimmer*, 74 id. 561; *Ormiston v. Olcott*, 84 id. 346; *Croft v. Williams*, 88 id. 384; *Paulding v. Sharkey*, Id. 432; *Bruen v. Gillitte*, 115 id. 16; *Wilmerding v. McKesson*, 103 id. 329.) Mrs. Haviland should not be chargeable because of any knowledge she may have had of the investment made by Cocks & Barlow in western mortgages to produce the widow's annuity. (*Emerson v. Bowers*, 14 N. Y. 454; *Croft v. Williams*, 88 id. 391; *Wilmerding v. McKesson*, 103 id. 340.) This action is brought and judgment is given against Mrs. Haviland for damages for neglect of duty alone, not for refusal to pay a legacy. It is, therefore, as against all the plaintiffs who were adults on the 14th of March, 1888, barred by the Statute of Limitations. (*Butler v. Johnson*, 111 N. Y. 204; Code Civ. Pro. §§ 396, 1819.)

Thomas Haviland for respondents. If any duty is imposed upon executors by the terms of a will or any power conferred

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upon them, not appertaining to the duties of executor, a trust is created; and the power of a trustee thus imposed upon him, are not incident to his office of executor, but belong to an entirely distinct character, that of trustee. (*Hurlburt v. Durant*, 88 N. Y. 121; *Ward v. Ward*, 105 id. 68; Code Civ. Pro. §§ 2818, 2819.) Defendant is responsible for the non-performance of her duty under the will. (*Remington v. Walker*, 99 N. Y. 626; *Earls v. Earls*, 93 id. 113; *Wilmerding v. McKesson*, 103 id. 329.) This action is not barred by the Statute of Limitations. (Code Civ. Pro. § 1819; *In re Van Dyke*, 44 Hun, 394.)

BRADLEY, J. The main defense is founded upon the alleged fact and assertion that the defendant did not participate in the administration of the estate of the decedent, and, therefore, that she was not chargeable with liability for the failure to make the investment, as directed by the will, of the share to which the plaintiffs were entitled on the death of their father David Cocks, or for the devastavit of the two executors who took charge of the estate and assumed to administer it. Upon this subject it appears and the trial court found that Harrison Cocks and George J. Barlow, immediately after the testator's death, took actual possession of his assets and property, and that they at once became and, until the time of the failure in 1876, continued to be the acting executors of the will, and that during that time no portion of the assets came into the hands of Mrs. Haviland, except that which she received as and for her share of the residuary estate, and that she took no active part in the management of the estate, but left its management entirely in the hands of those two executors. The proposition is well settled that the mere fact that one of two or more executors or trustees is passive and does not interfere with the act of his co-executors in taking possession of the property and collecting moneys of the estate, will not charge him with liability for waste by them, unless he has some reason to apprehend that such may be the consequence of their taking it and making such collections. (*Bruen v. Gillet*, 115 N. Y. 10.) There

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is no finding or evidence to warrant the conclusion that the character and habits, business or otherwise, of Harrison Cocks and Barlow were apparently such as to create suspicion in the mind of the defendant that they were not prudent, reliable and responsible business men, until their failure in 1876, about eight years after they had assumed the administration of the estate under the will. In the meantime, they had divided it into shares and handed over to the beneficiaries, except David, their portions of the residuary estate. And on the occasion when the bulk of it was so divided all of them including David were present, and the share for his family was apportioned and set apart by those two acting executors. It was then by David examined and handed to Barlow to be taken care of. There was no participation of Mrs. Haviland in the matter other than to receive the share apportioned to her by them. It is not claimed that by any act of hers she became chargeable to the plaintiffs, but that her liability arose from negligence on her part to perform the duty imposed upon her by the will, and which she assumed by the acceptance of letters testamentary; and that such neglect was in the failure to make the investment of the share to which the plaintiffs were eventually entitled. It is true that by the will the duty was devolved upon the executors alike to observe and execute all of its provisions, but one is not liable for the misconduct or neglect of another to which the former has in no manner contributed nor by any act has enabled him to violate his duty or to neglect its performance to the prejudice of the beneficiaries of the trust. The defendant did nothing to place the funds or property in the control of the two acting executors or to give to them its management. This they assumed, and she did not attempt to obstruct their administration of the estate. The court determined, as conclusion of law, that by her neglect to perform her duty in respect to the investment of the one-fifth of the amount of the residuary estate for the benefit of the plaintiffs, the defendant became liable to them for that amount, or so much thereof as was not invested pursuant to the direction of the will. This conclusion rests upon the mere omission of

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Mrs. Haviland to act for the accomplishment of that object, and to consummate it. The rule of liability does not go so far as to charge an executor having none of the funds of an estate in his possession or under his control, with the consequences of the neglect or failure of his co-executor to make the disposition by investment or otherwise of the subject of the trust pursuant to the direction of a will where the latter lawfully has the entire fund in his hands and assumes its management, unless there is some occasion to suspect that he has or may fail to execute the will in that respect. (*Croft v. Williams*, 88 N. Y. 384; *Ormiston v. Olcott*, 84 id. 339; *Wilnerding v. McKesson*, 103 id. 329.) When it was established that without aid of the defendant the two executors, Harrison Cocks and Barlow, took the property of the estate into their hands and assumed the active duty of its management; that none of it came to her possession; and that she was merely passive in respect to it, the burden was cast upon the plaintiffs to prove some facts or circumstances having relation to the character or habits of those persons, or to the manner they apparently were executing the trust, which would fairly justify suspicion that they were or might be chargeable with its mismanagement. In that case it may be that their co-executor would be called upon to investigate, and, if necessary, to cause them to render an account and thus present the condition of the fund with a view to such direction as the situation should require for its protection and the proper disposition of it. There was no fact found, nor does there appear to have been any evidence to permit the conclusion that Mrs. Haviland, before the failure of the firm of Cocks & Barlow (composed of the two acting executors), had any reason to suppose or apprehend that they would divert the fund set apart for David's family from the purpose directed by the will. It is, however, found that they failed to make the investment for the benefit of the widow as directed by the will; but that they did invest for that purpose, at the rate of ten per cent interest, \$10,000, secured by mortgage upon land in the state of Wisconsin; and that although the defendant remonstrated against

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such investment before it was made she took no action to compel them to make a proper investment of that fund. This had relation to the matter of the income for the widow and the investment which the will directed to be made to produce it. The investment so made in violation of the trust was not assented to by the defendant. No loss resulted from it. It is not seen how the taking of that security upon the Wisconsin land would alone furnish to a prudent and reasonably cautious person suspicion that the executors taking it had failed or would neglect to properly execute the will in respect to the fund in which David and his family were interested. And the same, in connection with it, may be said of the fact that the defendant knew as late as 1872 that no other investment had been made for the benefit of the widow, and that she then joined with four other executors (including Harrison Cocks and Barlow) in an undertaking to the widow that her annuity should be paid. This may well have been executed by the defendant upon the faith that the acting executors would provide for and see to the payment of the annuity. This matter was independent of the duty in respect to the one-fifth which is the subject of this action. There is no finding of any specific fact which tends to charge the loss of the funds in question or failure to invest it to any negligence of the defendant other than that she passively permitted the two acting executors to have the exclusive management of the trust created by the will. There may be cases where an executor cannot passively permit his co-executor solely to control the management of an estate without becoming responsible for his failure to properly execute the will to the prejudice of its beneficiaries, but that depends upon something further than the mere fact that letters testamentary have been issued to and accepted by the former. This rule is distinctly recognized in the cases before cited. The conclusion that by the negligence of the defendant she became liable to the plaintiffs for the amount uninvested of the one-fifth of the residuary estate given them by the will, seems not to be supported by the facts appearing in the record before us.

Statement of case.

In *Earle v. Earle* (93 N. Y. 104) the executor who sought to relieve himself from liability had not only joined in an accounting charging himself jointly with his co-executor, but he had been somewhat active in the matters of the trust, and negligently had permitted persons not executors to have more or less charge of the funds, and besides that, his co-executor was a woman of feeble health and without business experience. That case does not seem applicable to the situation in the present one. Nor in view of the facts upon which it was founded is the proposition declared in *Remington v. Walker* (99 N. Y. 626) essentially applicable to the case at bar.

The facts as represented by the findings of the court or by the evidence do not, we think, justify the conclusion that the defendant was charged with liability for the loss to the plaintiffs occasioned by the default and misconduct of the two acting executors.

The final and interlocutory judgments should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgments reversed.

BLANCHE L. ANDREWS, Respondent, v. WILLIAM C. BREWSTER et al., Executors, etc., Appellants.

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145	686
126	433
150	50

Plaintiff, who was entitled to a share in the estate of C., presented a claim against his executor B. for the alleged negligent failure of the latter to rent certain real property belonging to said estate. In consideration of the payment to her by B. of her share in the estate and his parol agreement that he would leave her a share of his own estate, equal to that he should leave H. and K., and that it would amount to more than sufficient to compensate her for any loss she had sustained, plaintiff conveyed to B. her interest in the estate and executed a written release of all claims against B. on account of the loss of rent. B. died, leaving a will, by which he gave to H., K. and plaintiff \$1,000 each; his residuary estate he directed to be distributed according to law. H. and K. took each a one-twelfth interest in said residue. In an action against B.'s executors to recover damages for an alleged breach of the parol agreement, held, that the

Statement of case.

release of the claim for rents was a good consideration therefor; that it was not necessary for plaintiff to show that B. had been negligent in not renting the property, or that a valid claim existed against him for the loss of the rents.

Also *held*, that the written release was not the repository of the whole agreement between the parties, but simply a part of it, hence plaintiff was not precluded thereby from proving the other part under the rule excluding parol evidence tending to vary or contradict a written contract.

The trial court, at defendant's request, charged the jury that the only agreement they could find was that B. had agreed to leave plaintiff by his will a share of his estate equal to that which he should leave H. and K. This was not excepted to. The court, however, refused to charge that plaintiff could not recover more than an amount to which, under the will, H. and K. were entitled; but charged that she could recover, irrespective of what H. and K. received, the amount of her claim for lost rent, with interest. A verdict was rendered for the full amount of the claim. The General Term modified the verdict by allowing, in case plaintiff should by stipulation consent thereto, a recovery for an amount equal to one-third of the residuary estate with interest. *Held*, that both rulings were error.

It seems, the General Term had power to permit plaintiff to stipulate to modify the verdict and to direct judgment for the reduced sum instead of ordering a new trial, as when the fact of the making of the agreement was established the amount of the verdict plaintiff was entitled to, under any rule of damages adopted, was a question of law.

Defendant moved on the trial for a dismissal of the complaint on the ground that as there had been no accounting by the executor, the exact amount of the residuary estate was not ascertainable, and plaintiff's only remedy was in equity. *Held*, untenable; that the court had ample power to inquire into the amount of the estate and ascertain the sum to be divided among the residuary legatees; that if the case was one triable by the court at Special Term, it could have been sent to that court by the Circuit Court, but as defendants made no such request their right to object to a jury trial did not survive its commencement.

(Argued February 24, 1891; decided March 10, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department entered upon an order made October 24, 1889, setting aside a verdict in favor of plaintiff and granting a new trial unless plaintiff stipulates to reduce the verdict as specified, and in case such stipulation is made overruling defendants' exceptions and denying a motion for a new trial, which stipulation was made.

Statement of case.

This action was brought to recover damages for an alleged breach of contract between plaintiff and Seabury Brewster, plaintiff's testator.

The facts, so far as material, are stated in the opinion.

A. R. Dyett for appellants. The plaintiff has not been permitted simply to reduce the verdict which the jury found, but to substitute another and fictitious verdict, founded on a different theory and composed of entirely different elements. This cannot legally be done. (*Whitehead v. Kennedy*, 69 N. Y. 468; *Moffat v. Sackett*, 18 id. 522.) It is well settled that an erroneous ruling is presumed to have been injurious and calls for a new trial, unless the court can see that it could not possibly have effected the result. (54 N. Y. 69; 56 id. 664; 54 id. 334, 341, 342; 80 id. 181; 13 Wkly. Dig. 199; 59 N. Y. 555, 643; 47 id. 186.) The court erred in admitting evidence to prove or tending to prove the parol agreement between Seabury Brewster and the plaintiff, upon which the plaintiff's cause of action alleged in the complaint depends. The court also erred in admitting evidence of what the plaintiff said to Seabury Brewster when she signed the papers. It was incompetent to vary the release. (*Coon v. Knapp*, 8 N. Y. 402; *Van Bokelen v. Taylor*, 62 id. 105; *Eighmie v. Taylor*, 98 id. 294; *Dana v. Fiedler*, 12 id. 40; *Walls v. Bailey*, 49 id. 464; *Collender v. Dinsmore*, 55 id. 200; *Sterns v. Tappin*, 3 Duer, 294; *Telkins v. Whyland*, 24 N. Y. 338; *Randell v. Reynolds*, 20 J. & S. 145; *Naumberg v. Young*, 15 Vroom, 331, 335; *Spickerman v. McChesney*, 43 Hun, 637; *Fordyce v. Scribner*, 108 Ind. 85; *Brady v. Cassidy*, 104 N. Y. 147; *Swain v. Grangers' Union*, 69 Cal. 186; *Brown v. Bowen*, 90 Mo. 184; *Fox v. Abbott*, 16 Wkly. Dig. 159; *Kane v. Cortesy*, 100 N. Y. 132; *Corse v. Peck*, 102 id. 513.) The alleged promise or agreement was not a valid one. (*Wakeman v. Sherman*, 9 N. Y. 85, 92; 4 Penn. 322, 323; Story's Eq. Jur. § 1521; *Greenfell v. Girdlestone*, 2 Y. & Col. 60, 62; *Kyle v. Wells*, 17 Penn. 289, 290; *Fletcher v. Updyke*, 67 Barb. 367; *Bloodgood v. Bruen*, 8

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N. Y. 362, 367.) The parol agreement, *quoad* the real estate, was an agreement to devise real estate to the plaintiff, and is absolutely void at law. (*Lisk v. Sherman*, 25 Barb. 433; *Martin v. Wright*, 13 Wend. 460; *Robinson v. Raynor*, 28 N. Y. 494; *A. B. & C. Co. v. Pratt*, 10 Hun, 443; *Merrit v. Seaman*, 6 N. Y. 168; *Tooley v. Bacon*, 70 id. 34; *Quimby v. Strauss*, 90 id. 664; *Bergman v. Jones* 94 id. 51; *Tozer v. N. Y., etc., R. R. Co.*, 105 id. 659.) The court erred in allowing the question put to the witness Rosevelt: "State whether or not the advice you gave Mrs. Andrews was after she had stated to you what had taken place between her and Seabury Brewster." (*In re N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 654.) The court erred in excluding the judgment-roll offered in evidence by the defendants in the case of the public administrator, etc., against the defendants. (*Doty v. Brown*, 4 N. Y. 71; *Goddard v. Benson*, 15 Abb. Pr. 191; *Krauth v. Bassett*, 34 Barb. 31; 1 Greenl. on Ev. 523; Smith's L. C. 20; How. St. Tr. 538; 9 Dowl. 228; *Bates v. Stanton*, 1 Duer, 79; 26 Barb. 16; *Burr v. Rigler*, 17 Abb. Pr. 177; Code Civ. Pro. § 2745; *In re Brewster*, 19 N. Y. S. R. 698; *Trust Co. v. Telegraph Co.*, 47 Hun, 315; *McCulloh v. Colby*, 4 Bosw. 603; *Muller v. Earl*, 5 J. & S. 388; 2 R. S. 88, §§ 34, 39; *Field v. Field*, 77 N. Y. 294; Redf. on Surr. [2d ed.] 512, 516.)

William Allen Butler for respondent. There was no error in the admission of the evidence relating to the statements, representations and negotiations connected with the settlement and division of the estate in May, 1881, leading up to the execution of the several written instruments connected therewith, including the release by plaintiff to Seabury Brewster, dated May 9, 1881. (*R. Co. v. W. Co.*, 119 N. Y. 592.) The court properly refused to rule that the release by the plaintiff to Seabury Brewster of May 9, 1881, cut off the plaintiff's cause of action. (*Chapin v. Dobson*, 78 N. Y. 74; *Juilliard v. Chaffee*, 92 id. 529; *Bookstaver v. Jayne*, 60 id. 146; *Remington v. Palmer*, 62 id. 31; *Van Brunt v. Day*, 81 id. 251;

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8 Abb. [N. C.] 336; *Dodge v. Zimmer*, 110 N. Y. 43; *Eighmie v. Taylor*, 98 id. 288; *Morgan v. Smith*, 7 Hun, 244; *B. F. Ins. Co. v. Burger*, 10 id. 56; *Jones v. Jones*, 18 id. 438; *Unger v. Jacobs*, 7 id. 220.) There was no conflict of evidence as to the promise made by Seabury Brewster and communicated; the sole conflict was as to what took place at the time of the signing of the release and other papers; this raised a question of fact which was properly submitted to the jury. (*Juilliard v. Chaffee*, 92 N. Y. 529; *Martin v. Pycroft*, 2 DeG., M. & G. 785; *Jervis v. Berridge*, L. R. [8 Ch. App.] 351; *Remington v. Palmer*, 62 N. Y. 31; *Adams v. Hall*, 2 Den. 306; *Wheeler v. Billinger*, 38 N. Y. 263; *Eighmie v. Taylor*, 98 id. 288; *Stearns v. Tappin*, 5 Duer. 294.) The evidence as to the amount of loss to the plaintiff by the failure of Seabury Brewster to lease the Park Row and Broadway premises was properly admitted, and was material and relevant for the purpose of showing the existence and extent of plaintiff's claim in that regard against Seabury Brewster on May 9, 1881. (*Rector, etc., v. Teed*, 120 N. Y. 583; *Wills v. Horton*, 4 Bing. 40.) The judgment-roll offered in evidence by defendants' counsel, was properly excluded by the court. The plaintiff was not a party or privy to that action. (*Krekeler v. Ritter*, 62 N. Y. 372.) The error of the trial court as to the rule of damages was properly corrected by the General Term, and the amount of the verdict properly reduced, in conformity with the opinion of the General Term. (*Fish v. Folley*, 6 Hill, 54; *Horton v. Blissett*, 4 Bing. 40; *Ogden v. Marshall*, 8 N. Y. 340, 343; *Wicker v. Hoppock*, 6 Wall. 94; *Schell v. Plumb*, 55 N. Y. 592.) The order of the General Term, made October 24, 1890, permitting a reduction of the verdict from \$57,681 to \$54,426.11, was a proper exercise of discretion, and is not open to exception. (*Whitehead v. Kennedy*, 69 N. Y. 462, 468; *C. E. Bank v. N. Bank*, 91 id. 74, 83; *Mason v. Williams*, 25 N. Y. S. R. 484; *Jansen v. Ball*, 6 Cow. 628; *Sturgis v. Law*, 3 Sandf. 451; *Coulter v. A. E. Co.*, 5 Lans. 67; *Mahar v. Simmons*, 47 Hun, 479.)

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BROWN, J. The agreement which the plaintiff alleged in her complaint, and the breach of which constitutes her cause of action, was that in consideration of plaintiff conveying to Seabury Brewster her interest in the real estate of which Christopher Starr Brewster died seized, and giving to said Seabury a formal release of all claims which she held against him, he agreed "that by so doing she would sustain no loss, and that by his will he would leave her an equal share of his estate with the surviving children of said Christopher Starr Brewster, and an amount more than sufficient to compensate her for any loss she had sustained."

The "loss" therein mentioned had reference to a claim which the plaintiff had made against Seabury Brewster for loss of rents of the real estate conveyed, and grew out of said Seabury's neglect for a number of years to rent the said real estate which consisted of valuable land and buildings on Broadway and Park Row in the city of New York.

It appeared that Seabury was the agent of his brother Christopher during the latter's life-time and had the care and custody of his property. By Christopher's will Seabury was appointed one of the executors and trustees. The will was not, however, probated until after the making of the agreement, which is the foundation of this action. But Seabury retained possession of his brother's property and managed it for his widow and children, with their knowledge and consent, they with himself being the sole beneficiaries under the will.

The agreement alleged in the complaint appears to have been a part of a plan or scheme for the settlement of Christopher's estate. The plaintiff, who was the widow and sole devisee and legatee of Louis Brewster, one of the sons of Christopher, was pressing Seabury for a division and settlement of the estate, and also for a settlement of the claim she made against him growing out of his neglect to rent the real estate.

Negotiations covering considerable time led finally to the adjustment of plaintiff's share in all the property at \$166,000, which sum was paid to her; whereupon she executed the deed

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and release already mentioned, and as a consideration for and an inducement to her to settle the estate in that way and execute said deeds and release the promise sued upon was made.

It was not essential to the plaintiff's case that she should prove that Seabury Brewster had been negligent in not renting the property, or that a valid claim in her favor existed against him for loss of the rents.

The cause of action alleged was not for the loss of rents, but was upon the new promise which the parties had substituted in its stead.

That promise was made in the presence of that claim, and in order to meet and dispose of it, and in consideration that the plaintiff would consent to the settlement of the estate which Seabury Brewster proposed, and release him from all claims made against him.

The release of the claim for the rents was a good consideration for the new promise, even though a defense to the claim might have been interposed and established, and the law will presume that by the surrender and release of the old claim there was a benefit to the promisor and injury to the promisee.

It was, therefore, of no consequence what Seabury Brewster's legal liability was on the claim for the rents. It was asserted against him and was colorable at least. It was recognized by him so far as to negotiate for its settlement, and as a result of that negotiation the plaintiff executed and delivered the release and Brewster gave the new promise. The claim for the rent, whatever was its legal status, was thereby destroyed and the new promise substituted in its stead; and this action has reference solely to the new agreement.

But the agreement was not attacked at the trial, nor is it now, for want of sufficient consideration to support it, but mainly for want of legal proof of its existence, and the claim is that it was cut off by the written release of the plaintiff, and all evidence offered to establish it was objected to by the defendants on the ground that it was inconsistent with and tended to contradict the release and destroy its legal effect.

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The release did destroy and discharge the testator from all claim against him for his neglect and failure to lease the buildings in question. That was its purpose, and that it should have that effect was the intention of both parties. And no recovery could now be had by the plaintiff upon that claim.

But it is out of the delivery of that release that the agreement now sued upon arose. It had its inception with the negotiation leading to the execution of the release and sprang into existence with its delivery, and it is because the plaintiff, at the testator's request, destroyed and released that claim that she may sue on the contract she now asserts.

The whole agreement with reference to the settlement of Christopher Starr Brewster's estate rested in parole, and the execution and delivery of the release was in part execution of that agreement. It was not the repository of the agreement between the parties, but its execution and delivery was one of the obligations under that agreement. The respective promises and obligations of the parties were mutual, and those of one party formed the consideration for the other.

The whole agreement was performed, so far as it was possible, during the life of Seabury Brewster, and this action rests upon one of the obligations that he assumed, but which could be performed fully only at his death.

The rule that excludes parol evidence tending to contradict or vary a written contract had, therefore, no application to the case.

In view of the ruling of the trial court we need not consider the discussion that is had upon the briefs of counsel and in the General Term opinion as to the meaning and import of the agreement as it appears from the testimony of the witnesses.

It rested wholly in parol, and the witnesses for the plaintiff do no agree upon its precise terms. The court, at the request of the defendants, ruled and charged the jury that the only agreement which the evidence permitted them to find that Seabury Brewster made with the plaintiff was one to leave to her by his will a share of his estate equal to that which he should leave to his nephew and niece Harry and Kate.

This charge was not excepted to by the plaintiff, and if it had been, the exception could not avail him on this appeal, and stands as the acquiescent interpretation by all parties of the import and meaning of the testimony given upon the part of the plaintiff.

The trial court, however, refused to charge that the plaintiff could not recover more than an amount which, under the will, Kate and Harry were entitled to, and did charge that if Mr. Brewster failed to keep his promise she was entitled to recover, irrespective of what Harry and Kate did get under the will, that which she gave up at the time of the execution of the release, viz., the amount of her claim for lost rents, and, as this was fixed without dispute at the sum of \$46,517, directed a verdict for that amount with interest.

The defendants' exception to the court's charge, and its refusal to charge, which I have quoted, in reference to the rule governing the amount of the verdict, was sustained by the General Term, and that learned court held that "the plaintiff's only claim was based upon what share she would have recovered of Seabury Brewster's estate had he kept his agreement," and upon the first argument ordered a retrial.

Upon a reargument, however, the General Term modified the verdict by allowing a recovery for an amount equal to one-third of the residuary estate, viz.: For \$54,426.12, with interest, and, as so modified, directed judgment for the plaintiff.

We are of the opinion that the General Term had power to permit the plaintiff to stipulate to modify the verdict, and to direct judgment for the reduced sum, instead of ordering a new trial, even though the rule of damages applied by that court differed from that applied at the trial. The only disputed question of fact was whether an agreement had been made between the plaintiff and Seabury Brewster. If it had, both parties agreed as to its terms.

There was, moreover, no dispute, but if that agreement existed and was not obnoxious to some of the defenses set up by the defendants that the measure of damages for its breach

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was either that applied by the trial court or a share of Seabury Brewster's estate. The several sums of money which the jury might adopt as its verdict according as they applied one or the other rule of damages, was not disputed. The loss of rents and interest was fixed at \$57,681.

The residuary estate in defendants' possession was agreed to be \$163,278.38 and it was stipulated that the distributive share of the surviving children of Christopher Starr Brewster (viz. : Harry and Kate) under the will of said Seabury, was one-twelfth part each if there was no equitable conversion by the will, and one-ninth each if there was an equitable conversion.

Under any rule of damages that might be adopted there was, therefore, no fact for a jury to determine. The fact of the making of the agreement having been established the amount of the verdict that the plaintiff would be entitled to was a conclusion of law, and could, therefore, be directed by the General Term.

That learned court fell into an error, however, in awarding the plaintiff one-third of the residuary estate. The ruling of the trial court to which I have referred, was that the agreement was to leave to the plaintiff a share of his estate equal to that which he should leave to his nephew and niece Harry and Kate.

The modification directed by the General Term is based upon the assumption that plaintiff was to be made one of three residuary legatees. There is no view of the evidence that justifies this result, and it is entirely inconsistent with the decision first made at the General Term that the plaintiff's claim was based solely upon what share she would have received if Seabury Brewster had kept his agreement.

It was not open to the General Term to inquire whether the evidence justified a finding of an agreement more favorable to the plaintiff than that held by the trial court, nor is this court permitted to interpret the evidence in any other way than that expressed in the ruling I have quoted.

That ruling in its application to the case, limits the plaintiff's recovery to one-ninth or one-twelfth of the residuary estate.

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The judgment entered by the General Term for an amount equal to one-third of the estate has, therefore, no support in the record.

Whether Harry or Kate's share in said estate was one-ninth or one-twelfth depended, according to the stipulation of the parties, upon the solution of the question whether there was an equitable conversion by the will.

The trial court was not asked to rule upon that question and it is not presented by any exception for review. Having ruled that neither share represented the measure of the plaintiff's damages, there was no occasion to ask the trial judge to decide which share the jury should adopt.

It is further claimed by the appellant that the trial court erred in not dismissing the complaint on the ground that there had been no accounting by the executors and that as there might be other and further expense of administration the exact amount of the residuary estate was not ascertained and that the plaintiff's only remedy was in equity.

The complaint stated a cause of action upon contract against the defendants and the plaintiff was entitled in the proper forum to establish her right to share in the estate. The fact that there were obstacles which prevented the ascertainment of the exact amount to which she was entitled would not have justified the court in dismissing the complaint.

The court had ample power to inquire into the amount of the estate and ascertain the sum which would be divided among the residuary legatees.

The defendant's objection went only to the mode of ascertaining that fact and not to the merits of the cause of action.

If the case was one triable at the Special Term it could have been sent to that court by the Circuit judge. But the defendants made no such request and the right to object to a trial at the Circuit did not survive the commencement of the trial before the jury.

The motion to dismiss the complaint was properly denied. No other exception requires discussion.

The judgment must be reversed and a new trial granted

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unless within thirty days the plaintiff stipulate to reduce the verdict to the smallest amount possible under the views herein expressed, viz.: thirteen thousand, six hundred and six and fifty-three-one-hundredths dollars. Upon making and filing such stipulation the judgment for such reduced amount with interest from the date of the verdict is affirmed without costs.

All concur.

Ordered accordingly.

EDWARD A. DURANT, JR., Respondent, v. HENRY R. PIERSON, as Survivor, etc., et al., Appellants.

Where a partnership is dissolved by the death of one of the copartners, the survivor is entitled to the possession and control of the assets of the firm, which he may sell, mortgage and dispose of to pay the debts and close up the affairs of the copartnership; in order to do this he may borrow money, and where a third person has in good faith loaned money for that purpose, which has been faithfully applied in liquidation of the firm debts, an equity is created, for the satisfaction of which the assets of the firm may properly be devoted. (VANN, J., dissenting.)

P., the surviving member of the firm of H. R. P. & Son, for the purpose of paying firm obligations, borrowed money from the C. N. Bank, for which he gave a note payable on demand, signed with the firm name by him as survivor; he applied this money in payment of firm debts. At the time said note was given the firm was insolvent, but P. and the bank were ignorant of that fact. P., as survivor, made an assignment for the benefit of creditors in which said bank was preferred the amount of said note. In an action to set aside said assignment as fraudulent and void because of this preference, *held* (VANN, J., dissenting), that the claim of the bank was one which, in justice and equity, should be paid out of the firm assets, and so, that its preference did not render the assignment fraudulent.

(Argued January 27, 1891; decided March 17, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 24, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

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Marcus T. Hun for appellants Prunyn and Pierson. The complaint in this case does not state a cause of action. (*Cuyler v. McCartney*, 40 N. Y. 221; *Bullis v. Montgomery*, 50 id. 352; *Burrill on Assignments*, § 404; *Rathbone v. Hooney*, 58 N. Y. 467; *Bigelow on Est.* 143; *Crook v. Rindskopf*, 105 N. Y. 476; *Wood v. Amory*, Id. 278.) A surviving partner may make a general assignment of the firm property with preferences. (*Haynes v. Brooks*, 116 N. Y. 487-490; *Williams v. Whedon*, 109 id. 333.) The rights of the firm creditors to the firm assets must be worked out through the equities existing between the partners, and only thus. (*Saunders v. Reilly*, 105 N. Y. 19, 20.) The equity ceases when one partner acquires the entire firm property. (*Dimon v. Hazard*, 32 N. Y. 65, 78; *Stanton v. Westover*, 101 id. 265; *Story on Part.* § 358; *Smith v. Howard*, 20 How. Pr. 121; *Fitzpatrick v. Flannigan*, 106 U. S. 648.) On and after the death of H. R. Pierson, Sr., the absolute title to the firm property vested in H. R. Pierson, Jr., the survivor. (*Crook v. Rindskopf*, 105 N. Y. 476; *Williams v. Whedon*, 109 id. 338.) A surviving partner may borrow money to pay firm obligations and repay the same from the firm assets. (*Haynes v. Brooks*, 8 Civ. Pro. Rep. 106; *Emerson v. Senter*, 118 U. S. 8.) Under the circumstances of this case, in view of the fact of the agreement made by the surviving partner with the bank that this money would be paid back out of the firm assets, that the note was given in the firm name, the amount credited to the firm account, that it was used to pay firm debts, and the mistake of fact as to the solvency of the firm, equity will give a lien upon the firm assets. (*Perry v. Bd. of Missions*, 102 N. Y. 99; *Fowler v. M. L. Ins. Co.*, 28 Hun, 195; *Smith v. Smith*, 51 id. 164.) The rights of the National Commercial Bank were properly subrogated to the rights of Durant and Rathbone. (*Gaus v. Thieme*, 93 N. Y. 225; *Sanford v. McLean*, 3 Paige, 122; *Wilkie v. Harper*, 1 N. Y. 586; 2 Barb. Ch. 338.) The burden of proving the assignment to be fraudulent rests with the plaintiff. (*Bernheimer v. Rindskopf*, 116 N. Y. 428-436; *Crook v. Rindskopf*, 105 id. 485;

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Knapp v. McGowan, 96 id. 75-87; *Rapalee v. Stewart*, 27 id. 310-315; *Benedict v. Huntington*, 32 id. 219; *Townsend v. Sterns*, Id. 209; *Bagley v. Bovee*, Id. 171, 177, 178.) The judgment was wrong in directing that all the firm assets be paid to the receiver. (Code Civ. Pro. § 1873.)

Abraham Lansing for the National Commercial Bank of Albany, appellant. The \$15,000 note, was in equity a promise binding the firm assets. The maker might have sold the assets of the firm to the bank, and out of the proceeds of the sale, paid the firm debts which were discharged by the avails of the note; or made a valid promise to the bank in the firm name by way of pledge or mortgage to secure the money which he borrowed. (*Williams v. Whedon*, 109 N. Y. 383; *Loeschigk v. Hatfield*, 5 Robt. 26; 51 N. Y. 600; *Bradford's Com. Bank Co. v. Cure*, L. R. [31 Chan.] 324.) An extension of the time of payment of a note, or waiver of the Statute of Limitations, or contract by pledge, or bond, or note, or otherwise made after the dissolution of a firm, by a continuing or surviving partner, will not charge a former copartner with an individual liability; and that is the question determined in the following cases, which were actions in the nature of assumpsit brought at law, to charge former copartners as joint debtors, upon promises made without their assent after dissolution. (*Van Keuren v. Parmelee*, 2 N. Y. 523; *National Bank v. Norton*, 1 Hill, 575; *Lansing v. Gaines*, 2 Johns, 300; *Sanford v. Mitchell*, 4 id. 226; *Vernon v. Manhattan Co.*, 22 Wend. 189; *Mitchell v. Ostrom*, 2 Hill, 520; *Lusk v. Smith*, 8 Barb. 570.) It is a wholly different question whether the assets of a partnership, over which the surviving partner has confessedly the entire power of disposition, are equitably bound by a general firm promise, made for the purpose of binding them and insuring to their benefit.

George L. Stedman for respondent. The debt of \$15,000 contracted by the survivor was his individual debt, and not a debt for which the firm assets were liable. (*Stedman v. Fied-*

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ler, 20 N. Y. 437; Pars. on Part. 440; *Farr v. Merrill*, 53 Hun, 35; *Hooley v. Gilve*, 9 Daly, 104; *Lark v. Smith*, 8 Barb. 570; *Bloodgood v. Bruen*, 8 N. Y. 362; *Van Keuren v. Parmelee*, 2 id. 523; *Sanford v. Michler*, 4 Johns. 224; *N. Bank v. Norton*, 1 Hill, 575; *Stewart v. Robinson*, 21 Abb. Pr. 63; Story on Part. 343; 2 Kent's Comm. 63; *Hull v. Laning*, 91 U. S. 170; *Lansing v. Gaines*, 2 Johns. 300.) The purpose for which the debt was created and the application do not change the personality of the debtor or the character of the indebtedness and render the firm assets liable. (*Turner v. Jaycox*, 40 N. Y. 470, 476; *Coster v. Clark*, 3 Edw. Ch. 411; *N. Bank v. Thomas*, 47 N. Y. 15.) An assignment of partnership property preferring or directing the payment of individual debts before partnership debts are fully paid is fraudulent and void. (*Wilson v. Robertson*, 21 N. Y. 587; *Menagh v. Whitwell*, 52 id. 146; *Bulger v. Rosa*, 119 id. 459, 465.) There is no principle of equity that can be successfully invoked in this case to change this legal status. (*Haynes v. Ward*, 4 Johns. Ch. 123; *Hubbell v. Carpenter*, 5 N. Y. 171; *Wilkes v. Harper*, 1 id. 586; *M. Ins. Co. v. Caleb*, 20 id. 177; *Gans v. Thiene*, 93 id. 225; *Acer v. Hotchkiss*, 97 id. 395; *Perkins v. Hall*, 105 id. 539; *Saunders v. Reilly*, Id. 19, 20; Story's Eq. Juris. § 12; Bispham's Eq. Juris. § 12.) If the \$15,000 loan had been otherwise proper, the fact that the amount due the bank was only \$10,150, the sum of \$4,850 having been paid while the assignment was in process of preparation and a few minutes before its execution, renders the assignment void. (Bishop on Ins. Debt. [2d ed.] 234, § 212; *Kavanaugh v. Beckwith*, 44 Barb. 197; *Talcott v. Hess*, 31 Hun, 282; *Oddie v. Bank*, 45 N. Y. 735.) The sufficiency of the complaint in this case has been adjudicated on motion of defendants and acquiesced in. (*Durant v. Pierson*, 29 N. Y. S. R. 510.)

HAIGHT, J. This action was brought to set aside an assignment made by the defendant Henry R. Pierson, as survivor of the late firm of Henry R. Pierson & Son, to the defendant

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Robert C. Pruyn, for the benefit of creditors, upon the ground that it was fraudulent and void as against the creditors of the firm for the reason that it directed the payment to the National Commercial Bank of the sum of fifteen thousand dollars.

The referee has found as facts that Henry R. Pierson, the elder, died on the 1st day of January, 1890, leaving the defendant Henry R. Pierson, his son, as the sole surviving member of the firm; that the firm kept an account with the National Commercial Bank of Albany in the name of Henry R. Pierson & Son, which was open and unsettled upon the books of the bank on the 9th day of January, 1890, at which time the defendant Pierson made application to the bank for the loan of fifteen thousand dollars; that upon making such loan there was credited upon the books of the bank to the firm the sum so loaned, and a note was given therefor payable on demand signed in the name of the firm by Henry R. Pierson, survivor; that \$10,150 thereof was subsequently drawn out of the bank by the checks of the defendant Henry R. Pierson, signed by him as survivor, and the same was applied and used in the payment of the debts of the firm. The referee further found as facts that the purpose of said defendant Henry R. Pierson in applying for and obtaining such loan was to procure money with which to pay the obligations of the firm, which had matured or were about to mature, and that the bank understood such to be the purpose of the loan at the time of making the same; that the firm was in fact insolvent on the 1st day of January, 1890, at the time of the decease of the elder Pierson, but that such fact was not known to either the defendant Pierson or the National Commercial Bank at the time the loan was made. He further found as a fact that in inserting in the assignment the direction to pay the National Commercial Bank of Albany from the firm property the amount of the note, the defendant Pierson acted with intent to hinder, delay and defraud the creditors of the firm, but that at the time of making such assignment the defendant Pierson believed that such note was a firm obligation or an obligation which was legally enforceable against the property and assets

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of the firm, and that he, therefore, was not morally chargeable with wrong in directing its payment out of the property of the firm; that the appropriation by him of the money borrowed of the bank to the payment of the firm debts created a claim in his favor against the estate which before the assignment could have been properly paid out of the firm's assets. As a conclusion of law he found that the debt created by the loan by the National Commercial Bank was the individual debt of the defendant Pierson, and not that of the firm; that the assignment was consequently fraudulent as to the plaintiff, and directed judgment accordingly.

If the debt created by the loan be the individual liability of the survivor, and one that the firm ought not to pay, and the firm be insolvent, the survivor had no right in his assignment to direct its payment out of the firm's assets, and by so doing the assignment was rendered fraudulent as to the creditors of the firm. (*Wilson v. Robertson*, 21 N. Y. 587; *Menagh v. Whitwell*, 52 id. 146; *Second National Bank of Oswego v. Burt*, 93 id. 233-245; *Bulger v. Rosa*, 119 id. 459-465.)

It thus becomes important to determine whether the loan contracted by the survivor became a firm obligation for the payment of which its assets may justly be applied. As we have seen, the note given upon procuring such loan bore the name of the firm and that of Henry R. Pierson as survivor, but at the time that this note was given it was known to all of the parties concerned that the senior member of the firm had died.

The death of a partner puts an end to the copartnership, and there is no longer any power or authority of the surviving partners to carry on for the future a partnership trade or business or to engage in new transactions, contracts or liabilities on account thereof. (Story on Partnerships, §§ 342, 343; *Hall v. Lanning*, 91 U. S. 160-170; *Farr v. Morrill*, 53 Hun, 31-35.)

It is thus apparent that whilst the note in form would appear to create an obligation of the firm, it is at law unavailable as such for the reason that there was no power in the sur-

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vivor to make it. But it does not follow but that it is a claim which ought in justice and equity to be paid out of the firm's assets. If it is, the preference in the assignment would not be void for the law will not declare fraudulent that which equity adjudges right and proper. (*Denton v. Merrill*, 43 Hun, 224-229.)

We must, therefore, consider whether there are equities which will support the claim of the bank to be paid out of such assets. It is apparent that the money borrowed from the bank by the survivor was for the purpose of paying the creditors of the firm the claims then matured and pressing. The amount of the loan was credited upon the open account of the firm with the bank and subsequently ten thousand dollars thereof or thereabouts were drawn out by the survivor upon his check and used in the payment of the liabilities of the firm. At the time this loan was made it was not supposed by the officers of the bank or the surviving partner that the firm was insolvent, and no question is made but that both parties acted in good faith. The question is, therefore, presented whether a surviving partner may in good faith borrow money for the express purpose of paying the debts of his firm, and by so applying the money borrowed create an equity for the satisfaction of which the assets of the firm may properly be devoted. As we have seen, the survivor became entitled to the assets which he had the right to sell, mortgage and dispose of in order to pay the debts and close up the affairs of the copartnership. If he had the power to sell or mortgage, it would seem to follow that he had the power to borrow and pledge the assets for the repayment of the loan, and the amount borrowed having been faithfully applied in liquidation of the debts of the copartnership, equity will recognize the justness of the claim of the party making the loan. Cases may arise where the exercise of such authority may be highly expedient, if not necessary, for the preservation of the rights of creditors and persons interested in the distribution of the assets of the firm; as for instance, creditors may by levy expose the assets to a forced public sale under circumstances which would work great sacrifice to the

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estate. In case a survivor should be insolvent, he might be able to raise money by a pledge to repay out of the partnership assets when he could not obtain it upon his own credit. We do not see that harm could result to the other creditors by permitting this to be done, for it would not increase the obligations of the firm nor lessen their share in the distribution of the assets in case the firm be insolvent. It is not questioned but that the survivor had the right to turn out as a security or pledge the assets of the firm in payment for the money received by him. He could have sold the assets and repaid the money loaned at any time before executing the assignment, and without taint of fraud. It is not apparent how the rights of the parties are changed and the act of the survivor made fraudulent by doing that in the assignment which he had the right to do immediately before executing it.

The precise question involved in this case does not appear to have been passed upon in any reported case so far as we have been able to discover except in *Haynes v. Brooks* (8 Civ. Pro. Rep. 106-113), where an assignment was made for the benefit of creditors by a surviving partner. In that case as in this the creditors had loaned money to the surviving partner to pay a note of the firm. VANVORST, J., in commenting upon the transaction said: "If a firm obligation was retired by the use of the money loaned or advanced by Brown & Co. the surviving partner would have been entitled to be repaid out of the firm property. As the moneys of Brown & Co. in fact paid a firm obligation I see no objection in the subrogation of them in equity to the rights of the surviving partner or to the regarding of them as entitled to be repaid out of the firm assets. That works injustice to no one." The learned judge concluded by ordering the complaint dismissed, thereby sustaining the validity of the assignment. This case was affirmed in the General Term, 42 Hun, 528, and in this court in 116 N. Y. 487. This question, however, was not considered in either of the appellate courts.

In *The Matter of the Estate of Davis and Desauque* (5 Whart. 530), it was held that after the dissolution of a copart-

nership the partner authorized to settle the estate may borrow money on the credit of the firm for the purpose of paying its debts, and if the credit be given in good faith, though with a knowledge of the dissolution, and the money borrowed be faithfully applied in liquidation of the debts of the partnership, the creditor has a claim against the firm assets and is not to be considered as a creditor merely of the partner borrowing.

In the case of *Prudhomme v. Henry & Laurans* (5 Louisiana Rep. 700), it was held that where a liquidating partner after dissolution has borrowed money to pay the debts of the firm, the partnership is liable so far as the evidence shows that the money was used for the benefit of the firm.

In the last two cases the partnerships were not insolvent, and the question arose as between the partners. The courts, however, recognized the claim of the lenders as one which ought to be paid by the partnership.

In the case under consideration it is true that the partnership is insolvent, and the question arises as between the bank and creditors of the partnership, but the creditors have not been harmed or prejudiced by the action of the bank in loaning the money to the survivor, for the assets were increased in value to the amount of the loan and the money drawn out of the bank was applied in extinguishment of the claims of the creditors, thus reducing to that extent the liabilities of the firm.

When a partnership is dissolved by the death of a partner, the survivor is entitled to the possession and control of the joint property for the purpose of closing its business and to that end and for that purpose he may, according to the settled principles of the law of partnership, administer the affairs of the firm and by sale, mortgage or other reasonable disposition of the property make provision for meeting its obligations. He may, for that purpose, borrow money and give a valid pledge of the copartnership property for its repayment. (*Williams v. Whedon*, 109 N. Y. 333; *Emerson v. Senter*, 118 U. S. 3-8; *Fitzpatrick v. Flannagan*, 106 id. 648; *Butchart v. Dresser*, 4 DeGex, McNaughton & Gordon,

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542; *S. C.*, 10 Hare, 453; *In re Clough, Bradford Commercial Banking Co. v. Cure*, L. R. [31 Chy. Div.] 326.)

In *Case v. Beauregard* (99 U. S. 119-124), Mr. Justice STRONG in commenting upon the rights of partners in a suit involving the marshalling of the assets says: "The right of each partner extends only to the share of what may remain after payment of the debts of the firm and a settlement of its accounts. Growing out of this right, or rather included in it, is the right to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. This is an equity that partners have as between themselves, and in certain circumstances it inures to the benefit of the creditors of the firm. The latter are said to have the privilege or preference sometimes loosely denominated a lien to have the debts due to them paid out of the assets of a firm in course of liquidation to the exclusion of the creditors of its several members. This equity is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner to be made effective only through him. Hence, if he is not in a condition to enforce it, the creditors of the firm cannot be. (*Rice v. Barnard*, 20 Vt. 479; *Appeal of the York County Bank*, 32 Pa. St. 446.)

But so long as the equity of the partner remains in him, so long as he retains an interest in the firm assets as partner, a court of equity will allow the creditors of the firm to avail themselves of his equity and enforce through it the application of those assets primarily to the payment of the debts due them whenever the property comes under its administration.

In the case of *Saunders v. Reilly* (105 N. Y. 12), it was held that a mere general creditor of a firm having no execution or attachment has no lien whatever upon its personal assets. That while firm creditors are entitled to a preference over creditors of the individual members of the firm in the payment of their debts out of the assets in the course of liquidation, their equity is not held or enforceable in their own right, but is a derivative one, practically a subrogation of the

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equity of each individual partner to have the firm assets applied primarily to the payment of its debts, and where no such equity exists in favor of any member of the firm the firm creditors have none and, therefore, where a judgment is recovered against all the members of a firm upon a joint obligation, but not an indebtedness of the firm, the firm property may be levied upon and sold on execution issued on the judgment. (See also *Dimon v. Hazard*, 32 N. Y. 65; *Stanton v. Westover*, 101 id. 265; *Kirby v. Schoonmaker*, 3 Barb. Ch. 46; *Brown v. Higginbotham*, 27 Am. Dec. 618; *Peyton v. Stratton*, 7 Gratt. 380; *Stebbins v. Willard*, 53 Vt. 665.)

It appears to us that the conclusion is warranted from the authorities referred to that where a person in good faith loans money to a surviving partner, and where the money is faithfully applied by such partner in satisfaction of the liabilities of the firm, the claim becomes one which in equity should be paid out of the assets of the firm; and in an accounting between the survivor with the personal representative of the deceased partner, equity will recognize the right of the surviving partner to have the money so borrowed and applied by him repaid out of the assets of the firm, and an assignment so directing is not fraudulent.

Attention is called to the fact that the deceased partner left a will making the survivor his sole devisee and legatee, and it is claimed that he left no individual debts. If this were so it is not apparent that it would affect the equities of the bank, but the evidence is silent upon the question as to whether or not the deceased left individual debts. The referee refused to so find, and we cannot assume that there were none.

It may also be claimed that the firm being insolvent the survivor has no equities to which the bank can be subrogated for the reason that he is liable individually for the payment of the firm debts. But the bank is not asking for any relief by way of subrogation, it is only defending the provision already made for it in the assignment from the claim of fraud. Even though both the firm and the survivor were insolvent, the survivor still had the right to have his contract recognized, and

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to say which of the creditors should be paid first and to so provide in his assignment. (*Williams v. Whedon, supra.*)

It follows that the judgment should be reversed and a new trial granted, with costs to abide the final award of costs.

VANN, J., dissents upon the ground that the note preferred in the assignment as a firm debt was simply an individual debt of the surviving partner, who, as he did not bind the firm in creating the debt, could bind neither it nor its property by directing payment out of the firm assets.

All concur with HAIGHT, J., except VANN, J., dissenting, and POTTER, J., not voting.

Judgment reversed.

In the Matter of Proving the Last Will and Testament of
JAMES CONWAY, Deceased.

In determining whether a will was executed in conformity to the statute (2 R. S. 63, § 40) courts will not consider the intention of the testator, but that of the legislature.

In drawing an instrument presented for probate as a will, a blank form was used, the whole of which was upon one side of the paper. A blank was left for the dispositions to be made, preceded by the words "I give, devise and bequeath my property as follows." This blank was filled up by three complete devises; at the end of the last was underlined, in parenthesis, the words "carried to back of will." Upon the back of the sheet was written the word "continued;" following it were various bequests, and then the words "signature on face of the will." The signature of the testator appeared at the end of the testimonium clause on the face of the paper, and those of the witnesses under the attestation clause. *Held* (BRADLEY, HAIGHT and BROWN, JJ., dissenting), that there was not such a subscription and signing by the testator and witnesses "at the end of the will" as is required by the statute; and, therefore, that the instrument was improperly admitted to probate.

Van Cortlandt v. Kip (1 Hill, 590); *Brown v. Clark* (77 N. Y. 369); *In re Washington Park* (52 id. 181); *Tonnele v. Hall* (4 id. 140); *Crossman v. Crossman* (95 id. 145), distinguished.

In re Conway (58 Hun, 16), reversed.

(Argued February 4, 1891; decided March 17, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order

124	455
158	268
124	455
f 162	7
124	455
170	86

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made October 23, 1890, which affirmed a decree of the surrogate of Wyoming county, admitting to probate the will of James Conway, deceased.

The will was written upon a printed form consisting of a half sheet about the size of a half sheet of legal cap. The form from the beginning of the will to the end of the attestation clause was wholly upon one side of the half sheet. On the back of the sheet was an indorsement "Will" with a blank between ruled lines for the name of the testator, so placed, that when the paper was folded as an ordinary legal paper the indorsement would appear on the outside. The usual direction for the payment of debts was printed and then followed the printed words, "I give, devise and bequeath my property as follows." Following these words was a blank space five inches long. Then a printed provision appointing an executor with a blank for the name. Then the testimonium clause, a blank space for the name of the testator and the seal; then the attestation clause and a blank space for the names of the witnesses. In drawing the will the blank space of five inches in the body of the instrument was entirely filled up with devises of three separate pieces of real estate to the testator's three sons. At the end of the third devise in parenthesis and underlined were the words "carried to back of will." Upon the back of the will just below the space left for the indorsement in parenthesis and underlined was the word "continued." Then followed bequests of personal property to the testator's sons and daughters, which filled up the whole of the back of the instrument from the space for indorsement to within one inch of the bottom, and below it all appeared the words "signature on face of the will."

The signature of the testator appeared at the end of the printed testimonium clause, and that of the witnesses below the attestation clause on the face of the paper.

Further facts appear in the opinion.

E. M. Bartlett for appellant.

George W. Bottsford for respondent.

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PARKER, J. We think the probate of the instrument should have been denied, on the ground that there was not such a subscription and signing by the testator and witnesses at the "end of the will" as is required by our statute. (2 R. S. 63, § 40.) The aim of the statute is to prevent fraud. To surround testamentary dispositions with such safeguards as will protect them from alteration. The provision "is a wholesome one and was adopted to remedy real or threatened evils. It should not be frittered away by exceptions. While its provisions should not be carried beyond the policy of the framers of it, that policy should not be defeated by judicial construction." (*Sisters of Charity v. Kelly*, 67 N. Y. 409.) If we were without authority to guide our action, could there be room to doubt that the subscription on this instrument is in contravention of the letter and spirit of the statute? The instrument commences as follows: "The last will and testament of James Conway," and on the same page towards the bottom it concludes, "In witness whereof I have hereunto subscribed my name * * *," and immediately following is the subscription "James Conway." If between such beginning and end all of the provisions of the will were written, there would be a full compliance with the statute. But such is not the case. On the other side of the sheet and occupying nearly the entire page are what purport to be important testamentary provisions. Now, can it be said that this will is subscribed at the end? That somewhere between the beginning and the signature of James Conway the matter written on the second page appears? These questions are emphatically answered in the negative by the decisions of this court in *Matter of O'Neil's Will* (91 N. Y. 516). In that case as in this the will was written on a printed form or blank. The written part was divided into thirteen paragraphs. The thirteenth being as follows: "And I authorize and empower my executors, hereinafter named, to sell, convey, assign and transfer my real property for the payment of the bequests hereinafter named and mentioned either at private" (here the writer came to the testimonium clause at the end of the blank

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space and thereupon turned over the sheet and completed the sentence on the top of the next page, as follows :) "at public sale, and in the manner that they will deem the most profitable and advantageous to my said estate, but in no case shall my said executors by process, by law or otherwise, sell and convey and dispose of my said real property before the lapse of five years after my death, unless my said executors shall see fit and proper to sell and dispose of the same by virtue of the authority hereinbefore given them as aforesaid." It was read to the testator in the presence of witnesses, the portion written on the top of the fourth page being read as if it had all been written in the blank space immediately after the word "private." He then signed the will just after the testimonium clause, declared it to be his last will and testament, and the witnesses at his request and in his presence subscribed their names as witnesses immediately underneath the attestation clause. This court in a carefully considered opinion delivered by Chief Judge RUGER, reached the conclusion that the testator and witnesses did not sign "at the end of the will" as commanded by the statute, and, therefore, the instrument was invalid and not entitled to probate. That decision both in its letter and spirit seems to be decisive of the question before us, but as it is insisted otherwise, reference will be made to the features wherein it is suggested that they are so far distinguishable as to permit a different result.

In this will the third written paragraph and the last on the first page ended about the middle of the last line before the testimonium clause, then enclosed in brackets was written the following: "Carried to back of will." On top of the second page and about half an inch above the commencement of the fourth subdivision enclosed in a bracket and underscored is the word "continued," and below the writing and near the bottom of the page are the words "signature on face of the will." While in O'Neill's will there are no such words, but the concluding paragraph is written on one side so far as the blank space would permit, and then concluded on the other. In each case it is conceded that it was the intent of the

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testator that the provisions appearing on the page following his signature should form a part of his will, and to each case is the remark of Chief Judge RUGER equally applicable that "while the primary rule governing the interpretation of wills, when admitted to probate, recognizes and endeavors to carry out the intention of the testator, that rule cannot be invoked in the construction of the statute regulating their execution. In the latter case courts do not consider the intention of the testator, but that of the legislature." (*Matter of O'Neil, supra.*) It is likewise true that in this will, as well as O'Neil's, the actual physical termination of the will is not at the place where the testator subscribed his name. And there seems to be no reason in the direction of giving support to the integrity of the statute as interpreted in *Matter of O'Neil (supra)*; *Matter of Hewitt* (91 N. Y. 261), and *Sisters of Charity v. Kelly* (67 id. 409), that will permit the court to make such use of the words "carried to back of will," "continued" and "signature on face of will," as will permit a holding that the signing was "at the end of the will." There is no less opportunity for fraud in cases like this than in the *O'Neil* case. For how can a case be conceived of where alteration can be more easily accomplished? A paragraph is ended and a portion of a line left, there then need but be written therein "carried to back of will," and then any number of disposing paragraphs may be written thereon. The words of themselves do not prove that they were written before the signing of the testator. Certainly, they furnish no more satisfactory evidence of having been written before the happening of such event than where the entire space before the testimonium clause is occupied by a subdivision of the will, which is simply completed on the next page as in the *O'Neil* case. And when, as frequently happens, one or both of the witnesses die before a will is probated, a contrary construction would seem to open a door for fraud which it was the aim of the legislature to close.

Again, if the rule of construction laid down in the *O'Neil* case be departed from to this extent, where can the line be

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drawn? If, by preceding the testimonium clause with the words "carried back of will," all that is written thereon may be made a part of the will, what is to prevent making another sheet a part of it also by writing on the bottom of that page continued on sheet one, and so on until any number of sheets of paper with testamentary provisions thereon be made a part of the instrument which is signed on the first page?

We have thus given some of the reasons which have led us to the conclusions:

First. That the *O'Neil* case requires this court to hold that this will was not signed at the end.

Second. That the attempted distinction may not be justified on the ground that it cannot be made to so operate as to permit frauds which it was the design of the legislature to prevent.

There now remains for consideration the basis upon which it is sought to found the distinction.

Reference is made to the rule stated in Williams on Executors, at page 97, "if a testator in a will or codicil, or other testamentary paper duly executed, refers to an existing untested will or other paper, the instrument so referred to becomes a part of the will," and other authorities tending to the same direction being cited, it is asserted that within the principle thus established "a testator may write substantial portions of his will upon the margin of the document, or upon the back of the paper, or upon the paper annexed to the will, if such provisions are referred to in the body of the instrument and connected therewith by means of asterisks, words or symbols indicating their relation to the provisions on the face of the paper."

A brief reference to the state of the law relating to the execution of wills in England will make it apparent that neither the decisions of its courts nor the rules deduced therefrom by English text writers can be made applicable to cases arising under our statute.

Prior to January 1, 1838, no solemnities were necessary for the making of a will of personal estate. Wills were admitted to probate which did not contain either the signature or seal

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of the testator, and were in the handwriting of some other person. While the Statute of Frauds provided the formalities of signature and attestation necessary for a devise of lands, by statute (1 Vict. chap. 26, § 9) it was provided "That no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." This act took effect January 1, 1838. A new ground of contest in the courts was now presented as to what should be considered a signing of the will at the end or foot thereof. Mr. Williams, in his work on Executors (p. 78), says the tendency was at first in the direction of a liberal construction of this part of the statute, but afterwards it was deemed necessary to take a more rigid view of the enactment on the ground that it was intended to prevent any addition being made to the will after the deceased had executed it. Accordingly probate was refused in a great number of cases. This result, not at all surprising, in view of the fact that prior to 1838 testamentary dispositions of personalty were frequently given effect where the testator had not even signed or authorized the signing of the writing, led to the passage of the statute (15 Vict. chap. 24) entitled "An act for the amendment of the laws with respect to wills," passed June 17, 1852. Section 1 provides as follows: "Where, by an act passed in the first year of the reign of Her Majesty Queen Victoria, entitled an act for the amendment of the laws with respect to wills, it is enacted that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction. Every will shall, so far only as regards the position of the signature of the testator or of the person signing for him, as aforesaid, be deemed to be valid within the said enactment as explained by this act

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if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such, his signature to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature placed among the words of the testimonium clause or clause of attestation shall follow or be after or under the clause of attestation, either with or without the blank space intervening, or shall follow or be after, or under, or beside the names, or one of the names, of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment, but no signature under the said act or this act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made."

Clearly it needs no other argument than is furnished by a statement of the practice in England respecting the probate of wills prior to 1838, and a reading of the amendment of 1852, to demonstrate the inapplicability of English decisions to a question like that before us. By statute the English courts are commanded to consider the intent of the testator in determining whether there was a due execution. With us it is the intention of the legislature and not that of the testator which controls such a question. (*Matter of O'Neil*.)

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Williams on Executors, Jarman on Wills and the English decisions cited need not, therefore, receive other consideration.

Van Cortlandt v. Kip (1 Hill, 590) decides simply that a codicil duly executed will amount to a republication of the will, causing it to speak as of the date of the codicil, and that when such is the case both should be read and construed together as one instrument. That proposition does not admit of controversy. (*Caulfield v. Sullivan*, 85 N. Y. 153-160.) But it is difficult to see how it can be made available in the disposition of the question now presented.

In *Brown v. Clark* (77 N. Y. 369), a woman executed her will, subsequently married, and then in due form executed a codicil which, after describing the will executed before marriage, continued as follows: "I do hereby republish, reaffirm and adopt the aforesaid instrument as my present will in like manner as if so executed by me, but modified pursuant to this codicil, which, in connection with and amendment of my said will, I now publish and declare together as constituting my last will and testament." And at the execution thereof the testatrix declared the instrument to be "a codicil to her last will and testament, and a reaffirmation of the latter." As her marriage operated to revoke the will (2 R. S. 64, § 44), the question presented was whether the execution of the codicil was a republication of the will. And such was held to be its legal effect. No other question was involved or decided, although reference was made to certain English decisions, which are not deemed in point for reasons already given.

Matter of the Commissioners of Washington Park, Albany (52 N. Y. 131), was a proceeding instituted to acquire title to lands under a statute requiring that in the petition the real estate sought to be taken must be fully described, and the names and places of residence of the parties owning or claiming an interest in the real estate stated. In the body of the petition the real estate was referred to as "hereinafter fully described and set forth," and the petition further declared that "hereafter is stated the names and places of residence of

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the parties * * *." Annexed to the petition were schedules containing the recitals called for by the statute. It was held that the schedules formed part of the petition, and that there was a sufficient compliance with the statute. That case does not seem to be applicable here. The statute is not the same, nor the object sought to be accomplished. It did not require that the paper should be subscribed at the end. And the reasons which induced the legislature to require that in case of wills the provisions thereof should all be written before the signature did not exist.

Tonnele v. Hall (4 N. Y. 140) was considered by this court in the *O'Neil* case, and need not be again referred to. The reference thus made to the authorities cited in support of the proposition enunciated in *Williams on Executors* may well be concluded by a quotation from the opinion in the *O'Neil* case: "It is not believed that any paper or document containing testamentary provisions not authenticated according to the provisions of our Statute of Wills has yet been held to be a part of a valid testamentary disposition of property, simply because it was referred to in the body of the will."

It is sought to further distinguish this case from *O'Neil's* on the authority of certain cases in which the effect of an interlineation or erasure are considered. *Crosseman v. Crosseman* (95 N. Y. 145), is the only case cited in which the question arose under our statute. In that case a will was executed in duplicate, in one there was an interlineation of the name of one of the executors, and it was noted at the bottom of the will before the attestation clause. The interlineation was necessary to make the two wills perfectly alike. And Judge EARL, in delivering the opinion of the court, said: "Where an interlineation, fair upon the face of an instrument, is entirely unexplained, we do not understand that there is any presumption that it was fraudulently made after the execution of the instrument. But here the interlineation was noted at the bottom of the instrument before the attestation clause, and so too, the interlineation was necessary to make it a duplicate. * * * Taking all these circumstances, there was

Dissenting opinion, per BROWN, J.

sufficient to cast the burden upon the contestants to show that the interlineation was fraudulent and unauthorized."

Now, can it be said that the provisions on the back of this instrument constitute an interlineation? They do not appear on its face, and do not have any necessary connection with that which precedes or follows them. Clearly such a determination is not supported by the *Crossman* case. And that decision should not be carried beyond its terms in order to obtain a basis for distinguishing this case from that of O'Neil's.

The judgment should be reversed and petition for probate dismissed, with costs.

BROWN, J. (dissenting). The appellant claims that the judgment should be reversed upon the authority of *Hewitt's Case* (91 N. Y. 261), and *O'Neil's Case* (Id. 516). In *Hewitt's* case the witnesses signed in the middle of the will, and the facts have no similarity to the present case.

In *O'Neil's* case the will was written on a printed form consisting of one sheet of four pages. The blank left for the insertion of special and substantial parts of the will was nearly three pages, and the formal termination and attestation clause was at the end of the third page. This was all filled up, and being of insufficient size to contain all the provisions the testator desired to make, the remaining portion was carried to the fourth page.

The names of the testator and witnesses appeared at the foot of the third page. These facts are similar to those in the case before us, but in one very essential particular the cases differ.

In *O'Neil's* case there was no reference in the body of the will to the writing on the fourth page, and that part of the will was in no way authenticated, and this circumstance was referred to by Judge RUGER in his opinion.

In this case there is a clear and distinct reference in the body of the will to the provision on the back of the paper, and they are connected by means of the words in parenthesis and their relation to each other indicated.

Dissenting opinion, per BROWN, J.

It is well settled that an interlineation or erasure on the face of a will does not necessarily destroy it, and there is no presumption where it is fair upon its face that it was made after execution. (*Crossman v. Crossman*, 95 N. Y. 145; *Speake v. United States*, 9 Cranch, 37; *Bailey v. Taylor*, 11 Conn. 531; Jarman on Wills, vol. 1, p. 144.)

So it is also established by numerous authorities that any written testamentary document in existence at the execution of a will, may by reference be incorporated into and become a part of a will provided the reference in the will is distinct and clearly identifies or renders capable of identification by the aid of extrinsic proof the document of which reference is made. (*Van Cortlandt v. Kip*, 1 Hill, 590; *Brown v. Clark*, 77 N. Y. 369; *Matter of Comrs. of Washington Park*, 52 id. 131-134; *Tonnele v. Hall*, 4 N. Y. 145; *Burton v. Newbery*, L. R. [1 Ch. Div.] 239; Williams on Executors, 97; 1 Jarman on Wills, 78.)

I think this will may be sustained within the principle of the authorities cited.

It would be quite too narrow a construction of the statute to hold that in no case is a will valid when a substantial provision was written below the signature when such provision is connected with the body of the instrument by a clear and distinct reference made to it.

By such reference it is incorporated into and becomes a part of the will, and no distinction is apparent between such a case and one where the testator writes upon the margin of the instrument or between the lines, and connects such writing with the body of the paper by an asterisk or hyphen.

In this case there are no suspicious circumstances appearing on the face of the will. It is all in one handwriting, and it is proved beyond question that the will was read to the testator and was executed in the condition it now appears, and the testator understood perfectly that part of the will was on the back of the paper. The words "carried to back of will" on the face of the paper, and the word "continued" on the back connect the two parts and indicate their relation to each other,

Dissenting opinion, per BROWN, J.

and in determining where the end of the will is, the writing on the back is to be read as if written on the face of the will.

No one could read this will in the ordinary way and reach the end without reading that part on the back of the paper. When the words "carried to back of will" are reached, one naturally turns to the back of the paper, and the word "continued" connects the parts. When that part on the back is read, the reader returns to the face of the paper and resumes the reading at the beginning of the clause appointing the executor.

The case would be the same if, instead of adopting the course pursued, the draughtsman had written on the margin of the face of the paper what appears upon the back and connected it with the body of the instrument with an asterisk.

The case does not fall within the mischief that the statute was designed to guard against, and there is no authority holding such a will as this invalid.

In *Sisters of Charity v. Kelly* (67 N. Y. 409), the signature of the testator appeared in the middle of the clause appointing the executors. In that case Judge FOLGER said: "The instrument is to be scanned to learn where is the end of it as a completed whole, and at the end there found must the name of the testator appear."

Scanning this will to ascertain where the end is, we cannot ignore the words and symbols which connect the body of the instrument with the writing on the back, and reading it in the light and meaning of those words and symbols, the signature appears at the end.

The judgment should be affirmed.

All concur with PARKER, J., except BRADLEY, HAIGHT and BROWN, JJ., dissenting.

Judgment reversed.

Statement of case.

GEORGE W. WHITE, Appellant, v. MARY REED et al., as
Executors, etc., Respondents.

It seems, that where one member of a firm sells out his interest in the firm to the other members, who continue the business with the firm property, and the sale is subsequently set aside for fraud, the out-going partner may require his copartners to account to him as trustees for the profits resulting from the business after his retirement.

Where, however, the retiring partner received on the sale more than the amount of his interest in the capital or assets of the firm, he is not entitled to share in the subsequent profits; the fraud that induced the sale entitles him to full indemnity for any loss suffered thereby, but does not entitle him to recover upon an accounting.

In an action for such an accounting, the sale was adjudged to have been induced by fraud, defendants were required to account, and it was directed that upon such an accounting plaintiff be charged with the moneys paid and the value of the property transferred to him on the sale. The referee decided that plaintiff received more than the value of his interest in the firm assets, and judgment was entered against him for the excess. *Held*, error; that after the obstacle produced by the sale and release was removed, plaintiff's remedy required an accounting to ascertain whether he was entitled to any, and, if so, what amount, treating his former partners as trustees of the capital in which he had an interest, and it having been found he had no such interest, he was not entitled to share in the subsequent profits; but that defendants had no cause of action or right of recovery against him.

(Argued February 4, 1891; decided March 17, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made November 3, 1890, which affirmed a judgment in favor of defendants entered upon the report of a referee, and from an order of said General Term which reversed a judgment in favor of defendants previously entered upon the report of another referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

George H. Adams for appellant. The proceedings upon the reference before Mr. Cole, and the report and judgment

Statement of case.

thereon, were in accordance strictly with the interlocutory decree, and were without error, and so, that judgment should be affirmed. (*Newdecker v. Kohlberg*, 3 Daly, 409; *McCabe v. Muschowitz*, 15 id. 37; Cooley on Part. §§ 338, 340, 342, 343, 345; 15 Ves. 218; 1 Jac. & Walk. 267; 2 Russ. 325; 1 Jac. 284; 4 Russ. 126; 17 Ves. 298; 2 Keen. 722; 4 Myl. & Cr. 41; *Richardson v. Bank of England*, Id. 155; Story on Part. §§ 182, 331, 348, 349; Pars. on Part. 230, 524; 2 Lindley on Part. 979; *Parsons v. Hayward*, 31 Beav. 199; *Miller v. Kean*, 27 id. 236; *Turner v. Major*, 3 Giff. 442; *Cook v. Collinbridge*, 27 Beav. 456; *Featherstonaugh v. Fenwick*, 17 Ves. 299, 303; *Townsend v. Townsend*, 1 Giff. 201; *McDonald v. Richardson*, Id. 81; *Flockton v. Bunning*, 8 Ch. 323; *Wilson v. Simpson*, 89 N. Y. 619, 620; *Collender v. Phelan*, 79 id. 366; *King v. Leighton*, 100 id. 386; *Taylor v. Hutchinson*, 25 Gratt. 536; *Hoyt v. Sprague*, 103 U. S. 626; Story on Part. §§ 133, 182, 230; 15 Ves. 226; 1 Anst. 94; 2 Brown Ch. 655; 1 Johns. Ch. 38, 165; 2 id. 117; 3 id. 433; *Durbin v. Barber*, 14 Ohio, 224; *In re Ross*, 87 N. Y. 516; *Tolman v. R. R. Co.*, 92 id. 353.) Referee Cummings' report goes not only upon the errors of the General Term, but contains gross errors of its own. (*Wright v. Delafield*, 25 N. Y. 266; *Hoar v. U. S. R. Co.*, 30 Hun, 375, 376; *Storrs v. Flint*, 14 J. & S. 498, 519.)

Albert Stickney for respondents. The plaintiff was not entitled to profits. (*King v. Leighton*, 100 N. Y. 386; *Wedderburn v. Wedderburn*, 2 Keen, 752; *Simpson v. Chapman*, 4 DeG., M. & G. 154; *Vyse v. Foster*, L. R. [8 Ch. App.] 309; L. R. [H. L.] 318; *Taylor v. Hutchinson*, 25 Gratt. 536, 539; 2 Lindley on Part. 979, 980, 991; *Crittenden v. Witbeck*, 50 Mich. 401; *Durbin v. Barber*, 14 Ohio, 311; *Bell v. Mehen*, 2 Cal. 159; *Turner v. Otis*, 30 Kan. 1; *Phillip v. Reeder*, 3 C. E. Green, 95.) The plaintiff was entitled to no allowance for good will. (*Stuart v. Gladstone*, L. R. [10 Ch. Div.] 626; *Hall v. Hall*, 20 Beav. 139; *Jones v. Butler*, 87 N. Y. 617) If the accounting brought the plaintiff in debt, he

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must accept that result, and the defendants are entitled to an affirmative judgment in their favor, although they pleaded no counter-claim. (Story's Eq. Pl. § 398; *Holderness v. Rankin*, 2 DeG., F. & J. 258; *Duryee v. Linsheimer*, 12 C. E. Green, 258, 366; *Andrews v. Gilman*, 122 Mass. 471; *Eddleston v. Collins*, 3 DeG., M. & G. 1; 1 Story's Eq. Juris. § 522; *Allen v. Allen*, 11 Heisk. 387; *Little v. Merrill*, 62 Me. 328; *Campbell v. Campbell*, 4 Halstead Ch. 740, 741; 2 Daniell's Ch. Pr. [5th ed.] 992; *Felder v. Wall*, 26 Miss. 595; *Griggs v. Clark*, 23 Cal. 427; *Grove v. Fresh*, 9 Gill. & J. 280; *Raymond v. Caine*, 45 N. H. 201; *Cook v. Jenkins*, 79 N. Y. 575; *Vassear v. Livingston*, 13 id. 248; Code Civ. Pro. §§ 501, 502.) This record presents only the appeal from the judgment of November 17, 1890. (*White v. White*, 110 N. Y. 642; Code Civ. Pro. §§ 191, 1316, 1325.)

BRADLEY, J. The plaintiff, Horatio Reed and Charles White, were equal partners in business from 1862 to August 4, 1876, when plaintiff sold out his interest to his partners. The plaintiff in 1881 brought this action against Reed and White to set aside the sale on the ground of alleged fraud and for an accounting, with a view to the recovery of an additional sum by way of capital and profits. The court determined that the allegation of fraud was sustained, and by interlocutory decree set aside the sale and directed an accounting, which was had before a referee, upon whose report judgment was entered in favor of the plaintiff for upwards of one hundred thousand dollars. That judgment was reversed by the General Term and a new accounting directed before another referee. (23 J. & S. 417.) It was had and resulted in a report and judgment against the plaintiff for upwards of eight thousand dollars. The latter judgment was affirmed. This appeal is from that affirmance and from the order reversing the judgment entered upon the first report. The interlocutory judgment, and the facts and conclusions of law found by the court directing it, remain undisturbed and effectual as the determination of the rights and liabilities of the parties, so far as they are

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dependent upon such decree. The business of the firm was large and consisted of buying live hogs in Chicago and shipping them to the city of New York, where they were slaughtered and the product disposed of. The plaintiff resided in Chicago and had charge of buying and shipping the hogs to New York, where they were received by Reed and White, who had entire charge of the business there, and kept the books representing the accounts of the firm. In fact New York was its place of business. In June, 1872, Reed entered into a secret arrangement with one Bate to sell and deliver to the latter, from day to day in the name of the firm, a large quantity of slaughtered hogs, to be disposed of by Bate for the joint profit of him and Reed to the exclusion of the firm. To accomplish this a formal agreement was made between them on the one part and certain persons of the other part, whereby the latter agreed to make advances and take dressed hogs on terms particularly mentioned; and the firm of Charles White & Co. made sales and deliveries to Bate up to February eighth following of over three million pounds of dressed hogs amounting to \$186,761.58. In June, when such arrangement was made, Bate was indebted to the firm \$24,722.71, and was then insolvent, of which Reed was advised when he entered into the agreement with him; and when the business with Bate was closed in February, 1873, his indebtedness to the firm had increased to \$44,735.74. In August, 1876, the plaintiff expressed to Reed and White dissatisfaction with the conduct of the business in New York, and especially with the loss occasioned by the indebtedness of Bate, and he proposed to sell his interest in the firm for a sum certain. After some negotiation he sold out to Reed and White and agreed to take in cash and notes about \$27,000, and one-third interest in certain real estate at a valuation of about \$30,000, making together \$57,000 for his interest. At that time a balance sheet was taken from the books which showed his credit balance to be \$70,818.40; and to induce him to make the sale for an amount less than such balance, the defendants represented to the plaintiff that the Bate account was of no value and ought

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not to be taken into account. The court found that the representations in that respect were false to the knowledge of Reed, and were made with fraudulent intent on his part to induce the plaintiff to sell his interest for less than its value, and with the fraudulent intent of concealing from him the true state of the affairs of the firm to his disadvantage. The value of the indebtedness of Bate was in the liability of Reed to account to the firm founded upon his secret arrangement before mentioned with Bate; and in that view the interlocutory decree directed that in the accounting Reed be charged with the value of the merchandise delivered to Bate by the firm after June 15, 1872, and credited with payments made by him to the firm. The further direction for the accounting given by the interlocutory decree, was that the defendants account for the disposition by them of the partnership assets which were in their possession on August 4, 1876; and that an accounting be had between the parties in respect to their several interests in the assets or their proceeds, or in the amounts for which the defendants might be chargeable in their disposition of them; that an account be taken of the assets and liabilities of the firm existing on that day; that the defendants file an account and the referee make an inventory of such assets and liabilities; and that he ascertain and determine what were the obligations of the defendants to the plaintiff in disposing of the partnership assets, or any of them, after the sale by him, and the amounts with which the defendants were chargeable by reason of such disposition; and that on such accounting the plaintiff be charged with all sums of money withdrawn by him or paid to him by the firm in August, 1876, also the value of all property withdrawn by or transferred to him by the firm or by the defendants at that time. The referee determined that the plaintiff received something more than he was entitled to at the time of the sale to Reed and White. This was based upon the finding made by him of the value of the firm assets at that time, and the determination that the plaintiff then received fifty-seven thousand dollars for his interest. Both of those propositions of fact are

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contested by the plaintiff, who insists that he did not receive and should not account for or be charged with that amount. The one-third interest in the real estate before mentioned was not conveyed to him, but an agreement was made by White, who held the legal title for the firm, to sell it to him and to make conveyance when requested to do so. In December, 1880, the plaintiff released White from the agreement to convey, in consideration whereof Reed and White paid the plaintiff nineteen thousand dollars. The plaintiff claims that he should not be charged with the \$30,000, but only with the \$19,000, as of the time he received the latter sum. And this is urged on the ground that when the sale by him to his partners, Reed and White, was set aside, the agreement to sell and convey such interest in the real estate referred to, fell with it, and he was chargeable in that respect with only what he received upon the release of it by him and as of the time he received the consideration of his release. That view does not seem tenable, as the fraud charged had no relation to the nature of the consideration which he received in payment for the transfer of his interest in the partnership property. Before the commencement of this action, he had released his claim under White's agreement to sell him the land for a specific consideration paid to him. And on this subject the interlocutory decree directed that in the accounting the plaintiff should be charged with all sums of money withdrawn by him from the firm in August, 1876, "also with the value of all property withdrawn by or transferred to him by said firm or by the defendants at that time." The estimated value then made seems to have been the amount for which the third interest in the land was taken by the plaintiff, and there is no other evidence and no finding or request to find upon the subject of its value at that time. And upon this review this court cannot say that it was worth then any less than the price allowed by the plaintiff for it.

The question whether his interest in the firm assets was entirely covered by the \$57,000 was one of more difficulty. All the partners had credit balances on the books, and the

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custom was to make annual rests and to add interest from year to year on such balances. They, as represented by the balance sheet of 1st of July, 1876, were: Charles White, \$124,657.41; Reed, \$84,096.99; plaintiff, \$70,818.40. The plaintiff's interest as thus represented (a sum equal to which he at first proposed to sell for) was reduced little less than one-third the amount of the Bate indebtedness in the arrangement pursuant to which he made the sale. These credit balances on the accounting were changed by adding some assets not on the books or in the ledger account at the time of the sale, also by charging Reed with the amount of the Bate indebtedness, which accrued after June 15, 1872, and adding one-third that amount to the balance of each of the other partners, thus producing actual credit balances as of August 4, 1876, as follows: Plaintiff, \$78,909.18; Charles White, \$132,748.19; Reed, \$68,515.43, making an aggregate, \$278,163.60. But the value of the interests of the partners so represented was dependent upon the actual value of the assets of the firm. And while they had the nominal value of upwards of \$290,000, the referee found that at that time the actual value was only \$201,181.77, and after charging one-third of the losses and depreciation and the small amount of liabilities to each of the parties, the result, as found by the referee, was that the \$57,000 was in excess of the plaintiff's interest in the partnership assets. While the evidence is not such as to necessarily require the finding that the value of the property of the firm on August 4, 1876, was no more than the amount so found to be its value, there was evidence which permitted the conclusion that if the partnership had been then closed up, the amount of the assets would have produced no more than that sum. The question upon the evidence was one of fact, and it cannot upon this review be held that the finding was without some evidence for its support. Assuming then that the plaintiff pursuant to his agreement to sell, received the value of his interest in the assets at that time, the question arises whether he was entitled to an accounting which would give him a right to participate in the profits of the business thereafter continued

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by Charles White and Reed. They carried on the same business at the same place until in June, 1884, and realized large profits; and the accounting was had after that time. Their deaths did not occur until in 1888. It is a general rule that when a partnership is dissolved by death of a member, or otherwise, and the other members continue the business, or enter upon new enterprises with the firm property, they may be required to account to the outgoing partner or his representative for the resulting profits. And in some cases it may be optional on his part whether they be required to allow to him a due share of the profits or interest upon his share of the capital. (*Crawshay v. Collins*, 15 Vesey, 218; 1 Jac. & Walk. 267; 2 Russell, 325; *Featherstonhaugh v. Fenwick*, 17 Vesey, 298; *Wedderburn v. Wedderburn*, 2 Keen, 722; 1 Myl. & Craig, 41.)

And the same rule is applicable where a sale by one member of a firm to his partners is set aside for fraud or other cause. (*Cook v. Collingridge*, Jac. 607; *King v. Leighton*, 100 N. Y. 386.)

It is, however, contended on the part of the plaintiff, that the practical effect of setting aside the sale was the restoration of the plaintiff's relation of partner and its continuance without interruption by the sale; and that at least he had a credit balance of upwards of \$21,000 remaining, and was entitled to share in the profits of the business until its termination in June, 1884. This would have been so if he had continued a partner and drawn out \$57,000. That sum would in that case have been charged to him on the books, and he would have been entitled to credit for one-third of the profits. He was not, in fact, a partner from the time of his sale. The firm before then existing was dissolved. And the setting aside the sale did not have the effect to restore the previously existing partnership; but in view of the purpose of this action the effect of the interlocutory decree was to charge the other partners (who had continued the business) as trustees, with liability to account to the plaintiff and allow to him what he was equitably entitled to of the profits of the business so continued, and to

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render to him his share remaining in the capital of the firm. This was a subject of inquiry on the accounting. And whether he had any interest in the capital was dependent upon its amount compared with that received by him on the sale. If the amount so received equaled one-third the amount of all the assets of the firm at that time, he had no interest remaining in the capital, and he derived no right to any by setting aside the sale. Nor for that purpose was there a restoration of the excess of the plaintiff's credit balance. The interlocutory decree, as understood, does not go so far as that. It directs the referee to take and state an account of the assets and liabilities of the firm on August 4, 1876. And while it also directed a further accounting by the defendants, it was left for the court, on the coming in of the referee's report, and on motion for judgment upon it, to determine the rights of the parties upon the accounting had. If, as found by the referee, whose report was confirmed by the court, the amount paid to the plaintiff on the sale exceeded the amount of his interest in the capital or assets of the firm, he had nothing in the property appropriated to or used in the business continued by Reed & White after the plaintiff's sale to them, and in that view it is difficult to see any principle upon which his claim for profits resulting from their business, conducted with their own property only, can be supported. While the fraud which induced the sale by the plaintiff gave him the opportunity to seek and obtain full indemnity for the loss he had suffered by it, with the right to treat the defendants as trustees, and require them to account and render to him the share of the profits of the subsequently conducted business in the event they used in it the joint property of the firm, the fact that he had no remaining interest in it denied to him the right to such relief. (*Taylor v. Hutchison*, 25 Grattan, 536; 18 Am. R. 699; *Vyse v. Foster*, L. R. [8 Chy. App.] 309; 4 Moak, 904; L. R. [7 H. L.] 318; 11 Moak, 1; *Simpson v. Chapman*, 4 DeG., M. & G. 154; 2 Bates on Part. § 797.)

There is no want of harmony in this view with *King v. Leighton*. In that case there were unfinished contracts, which

were the property of the firm at the time of the release of his interest in the partnership joint assets, which release the plaintiff was induced, by the fraudulent representations of the defendant, to give to the latter, who was held liable, upon the principle before mentioned, to account for the firm property and the profits realized from it in the subsequent conduct of the business by him, of which profits the plaintiff was held entitled to his share. And in the use by the defendant of such profits as capital, it is very likely he may have been required to also account therefor, and to allow to him a suitable measure of resulting profits. The granting relief of that character does not proceed on the ground that the party seeking it is a member of a continued partnership, but rests upon the fact that when he retired from the firm he had some remaining interest in the capital appropriated and used in the continuance of business by the other partners. And when they seek such an advantage by fraud they will not be permitted to profit by it to the prejudice of the outgoing partner. It may be that upon the evidence the plaintiff has reason to think that the value of the assets was greater than that found by the referee, but upon that question this court is concluded by the finding and its confirmation by the court below. It is true that knowledge of the fact, concealed from him at the time of the sale, of the liability of Reed to make good a portion of the indebtedness of Bate, would have increased the value, as he then understood it, of the firm assets \$20,000, and his credit balance upwards of \$6,000; but inasmuch as the ultimate purpose of this action was an accounting rather than to recover damages for the fraud, the right of the plaintiff to relief was dependent upon his having an interest in the assets as of and subsequent to the time of the sale. The entries in the books in that respect, or the credit balances, were only presumptive evidence of the value of the capital or assets of the firm. (*Jones v. Butler*, 87 N. Y. 613, 617.)

The good will of the partnership business of the parties seems to have had no consideration on the trial or accounting. The subject of it or its value was not specifically mentioned

in the interlocutory decree. Nor was it one of the considerations upon which the sale by and purchase from the plaintiff was founded. It quite clearly appears that the negotiations which resulted in the sale were had solely in reference to the credit balance of the plaintiff, and its comparison in amount with the then value of the assets. The matter of the good will or its value is not the subject for consideration. (*Stewart v. Gladstone*, L. R. [10 Chy. Div.] 626; 27 Moak, 161.)

In accordance with the views already expressed, the vital fact was whether the value of the assets at the time of the sale exceeded the amount which the plaintiff then received as its consideration. And as it was found that it did not, the plaintiff was not entitled to recover upon the accounting. In determining whether or not the judgment is supported by the findings of the referee as confirmed by the court, reference can be had only to the report upon which the judgment was entered. When the prior judgment was reversed the report of the referee on the first accounting became ineffectual.

But the only theory upon which the affirmative judgment in favor of the defendants can be supported is, that the parties were in fact partners and this action brought by the plaintiff as such for a dissolution and accounting. In that view the plaintiff's action would have a phase, which if given to it might lead to a different result. In such case, as suggested by the defendants' counsel, all parties are actors and judgment will be awarded for and against any of them as their rights may appear. Here the partnership existing on August 4, 1876, was then dissolved and did not in fact thereafter exist. The plaintiff's action was for relief founded on fraud; and after the obstacle produced by his contract of sale and release was removed, his ultimate remedy required an accounting to ascertain whether he was entitled to any and what amount, treating the original defendants, as he was permitted by the interlocutory judgment, as trustees of the capital in which he had an interest, and to charge them with the amount to which he was entitled of the profits of the business in which it had been employed by such defendants. He was the actor in the action.

Statement of case.

The defendants, so far as appears, had no cause against him upon which to found a counter-claim, and none was alleged.

The defendants were, therefore, not entitled to recover the affirmative judgment rendered in their favor.

The judgment, so far as by it the defendants recovered against the plaintiff \$8,325.78 and interest, should be reversed, and in other respects affirmed, and be modified accordingly, without costs in this court to either party.

All concur.

Judgment accordingly.

124	479
130	134

JAMES FRASER et al., as Executors, etc., Respondents, v. THE TRUSTEES OF THE GENERAL ASSEMBLY OF THE UNITED PRESBYTERIAN CHURCH OF NORTH AMERICA, Impleaded, etc., Appellants.

Where a will expressly confers power upon the executor to convert real estate into money, and it is evident that the testator contemplated that it must be done for the purpose of carrying the will into effect, and it appears that in no other way can the intent of the testator be effectuated, the realty will be deemed to have been converted into personalty.

McN. died leaving a will disposing of both real and personal estate; the latter was insufficient, at the time the will was executed and at the time of the testator's death, to pay his debts, the expenses of administration and the legacies given. The will gave to his widow the use of the testator's house and lot during life; it gave to the executors a sum to be held in trust for her benefit during her life, and they were authorized to sell the house and lot as soon as convenient, but within three years after the death of the life tenant; it also authorized them to sell his other real estate within three years after his death, and, until such sale, empowered them to take charge of it and its avails, and the balance of his personal property which remained after payment of debts, expenses and legacies, and to divide the residue of his estate between certain beneficiaries, as provided. In an action for a construction of the will, *held*, that a conversion of the realty into personalty being necessary to carry out the testator's purpose, it must be held to have been his intention that such a conversion should take place; and that, therefore, the realty should be considered as personalty to be disposed of in accordance with the terms of the will.

Scholle v. Scholle (118 N. Y. 261), distinguished.

Reported below, 58 Hun, 80.

(Argued February 27, 1891; decided March 17, 1891.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 23, 1890, which affirmed a judgment entered upon a decision of the court on trial at Special Term.

This was an action for the construction of a will.

February 26, 1880, John McNaughton duly executed his last will and testament, the material parts of which are as follows:

"Item first. I give and bequeath to my wife, Margaret McNaughton, my house and lot in the village of Caledonia, and all my household furniture, to have and to hold the same to her for and during her natural lifetime.

"Item second. I give in trust to my executors four thousand dollars to be securely invested, and the interest and income thereof paid to my wife, Margaret, semi-annually year by year during her lifetime. The above legacy and the provisions herein made for her are to be taken and received by her in lieu of all right or claim of dower of any land or real estate of which I may die seized, nevertheless. These bequests revert at the death of my wife and fall back into the general fund of my estate.

"Item third. I do hereby authorize and empower my executors, or a majority of them, as soon as convenient after the death of my wife, to sell and dispose of my real and personal estate of which I may die seized, on such terms as to the said executors or a majority of them shall seem just and proper, within three years after my wife's death.

"Item fourth. I give and bequeath to the following named children of my sister, Jannet McLaren, viz.: To John F. McLaren the sum of three hundred dollars, to be paid within three years from my death without interest.

"To William McLaren the sum of one hundred dollars, to be paid to him within three years from my decease without interest.

"I give to my niece Jane Atchinson the sum of three hundred dollars, to be paid within three years of my decease without interest.

Statement of case.

"Item fifth. I give and bequeath to my niece, Margaret Sharp, the sum of three hundred dollars to be paid within three years from my decease without interest.

"Item sixth. I give and bequeath to the following named children of my sister Margery McKensie, viz.: I give to Duncan McKensie the sum of three hundred dollars, to be paid within three years from my death without interest.

"I give to my niece Margery McDougal, three hundred dollars, to be paid within three years of my death without interest. If they all survive at the time of the final distribution of my estate; but if they do not all survive at the time of such distribution, such surplus, if any, shall be paid equally to the survivors.

"Item seventh. If there is not a vault on the lot where my wife Sybil's body is interred and where I direct my body shall be interred, I hereby require my executors to procure and erect a suitable vault upon said lot, of a capacity to receive two coffins with a raised panel on the cover with a suitable inscription engraved thereon, and all expenses incurred therefor I hereby authorize and direct my executors to pay.

"Item eighth. I hereby authorize and empower my executors or a majority of them, as soon as convenient after my decease, to sell and dispose of my real estate of which I may die seized on such terms as to the executors or a majority of them shall seem just and proper within three years from my death, and until said real estate is sold, I hereby authorize my executors to take charge and supervision over it, and the avails of the said real estate, together with such balance as shall remain of my personal property, after all debts, charges, funeral expenses and legacies are paid off as provided for, together with all expenses and charges of executing this will.

"Item nine. I hereby direct to be divided equally between and paid to the following named societies:

"I do hereby give and bequeath to the American Bible Society, formed in New York in the year 1816, one-fourth part of the residue of my estate, to be applied to the charitable use and purpose of said society.

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"Item ten. I do hereby give in trust to the Trustees of the General Assembly of the United Presbyterian Church of North America, the one-fourth part of the residue of my estate, to be appropriated by the said General Assembly to the Foreign Mission Fund of the said church.

"Item eleven. I also give in trust to the said General Assembly the one-fourth of the residue of my estate, to be appropriated by the said General Assembly to the Home Missionary Society Fund of said church.

"Item twelfth. I further give in trust to the said General Assembly the one-fourth part of the residue of my estate, to be appropriated by the said General Assembly to the Educational Fund of said church, and authorize my executors to pay over the same to them, or their treasurer for the time being, to be applied to the charitable use and purpose of said General Assembly.

"And lastly, I do hereby nominate and appoint my friends, James Fraser, Esq., and William H. Walker, both of Caledonia, Livingston County, N. Y., and Daniel Stewart, of Wheatland, Monroe County, to be the executors of this my last Will and Testament, hereby revoking all former Wills by me made."

April 26, 1881, the testator died, leaving him surviving Margaret McNaughton, his widow, and George H. Bristol and Larius F. Bristol, Jr., infant sons of a deceased daughter, his heirs and only heirs at law and next of kin.

The nephews and nieces to whom legacies were bequeathed are living. The testator's personal property was insufficient to pay his debts and the expenses of settling his estate. He died seized of a house and lot in the village of Caledonia (mentioned in the first item of the will), worth about \$4,000, and of a farm of 117 acres in the same village, worth about \$9,000, but subject to a mortgage of about \$2,600. This action was brought by the executors to obtain a construction of the will and to have the rights of the beneficiaries determined. The nephews and nieces to whom legacies are given by the fourth, fifth and sixth divisions of the will answer jointly, admitting the allegations of the complaint. The heirs at law served, through

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their guardian *ad litem*, the usual answer of infants submitting their rights and interests to the court. The American Bible Society and the Trustees of the General Assembly of the United Presbyterian Church of North America answered separately. No appeal is taken to this court, except by the Trustees of the General Assembly of the United Presbyterian Church of North America.

Joseph W. Taylor for appellant. There was no devise to this defendant. The executors were authorized to sell the real estate and directed to divide the avails of the sale, together with the personal property, and to pay the same to the legatees named. There was, therefore, a conversion of the realty into personalty, and a gift of the converted fund. (1 Schouler on Wills, §§ 489, 571; *Roe v. Vingut*, 117 N. Y. 204, 212, 218; *Chamberlain v. Taylor*, 105 id. 185, 191; *Parker v. Linden*, 44 Hun, 518, 521; 113 N. Y. 37; *Craig v. Leslie*, 3 Wheat. 563; *Lewin on Trusts* [8th ed.], 950; *Taylor v. Mitchell*, 57 Penn. St. 209; 3 R. S. [7th ed.] 2191, § 96; *Dodge v. Pond*, 23 N. Y. 69; 28 Barb. 121; *Lent v. Howard*, 89 N. Y. 169; *Hood v. Hood*, 85 id. 561, 571; *Power v. Cassidy*, 79 id. 604; *Flannigan v. Flannigan*, 8 Abb. [N. C.] 413; *Waldron v. Schlang*, 47 Hun, 252; 113 N. Y. 665; *Bogert v. Hertell*, 4 Hill, 492; *Asche v. Asche*, 113 N. Y. 232, 235; *In re Ransom*, 30 N. Y. S. R. 737; *Greenlund v. Waddell*, 116 N. Y. 234; 1 Redf. on Wills, 434; *Arcidarius v. Sweet*, 25 Barb. 403.) The power of sale has not become inoperative because the three years from testator's death, within which the sale was to be made, have expired. (*Waldron v. Schlang*, 47 Hun, 252; 113 N. Y. 665; *Mott v. Ackerman*, 92 id. 539, 551.)

P. M. French for respondents. Under this will there is no equitable conversion of real into personal property. (*White v. Howard*, 46 N. Y. 162; *Newell v. Nichols*, 12 Hun, 624; *Gourley v. Campbell*, 66 N. Y. 173; *Hobson v. Hale*, 95 id. 588; *Wright v. Trustees, etc.*, Hoff. Ch. 202.) While a conversion may be implied it must be positive and is implied only

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when the design and purpose of the testator is unequivocal, and the implication so strong as to leave no substantial doubt. The direction for the exercise of the power of sale not being imperative, if the intention of the testator can be carried out without conversion, the land will pass as such and not be changed into personalty. (*Scholle v. Scholle*, 113 N. Y. 270, 271; *Hobson v. Hale*, 95 id. 602; *Chamberlain v. Taylor*, 105 id. 191.) No conversion will be implied in this case because the gifts or devises are invalid. (Laws of 1860, chap. 360; 4 R. S. [8th ed.] 2545, § 3; *Haxtun v. Corsee*, 2 Barb. Ch. 521; *Chamberlain v. Taylor*, 105 N. Y. 194; 43 id. 431.) The power of sale contained in "item eighth," being by its terms limited to "within three years from my death," has now expired by reason of non-user within the specified time. The direction is to sell within three years, and this implies they are not to sell after that time. (*Richardson v. Sharpe*, 29 Barb. 222; *Dunshee v. Goldbacher*, 56 id. 579.)

FOLLETT, Ch. J. The only question presented by this appeal is whether the testator's realty is converted by the will into personalty. The fee of the farm is not devised, nor is the fee of the house and lot, and both, upon the death of the testator, descended to his heirs at law, George H. Bristol and Larius F. Bristol, Jr., subject to the life estate of the widow in the house and lot, or to her dower right in both, as she may have elected, and also subject to such legacies, if any, as are charged upon the realty. It is evident from the face of the will that the testator did not intend to die intestate as to any part of his estate. In all of the divisions of his will, subsequent to the seventh, he speaks of the residue of his estate, which he disposes of as such in those provisions. This will was executed just fourteen months before the testator's death, and it is not asserted that his liabilities were increased, or the amount or character of his estate changed within that period, and at his death his debts exceeded his personalty. He directed, by the second division, that there should be invested for the benefit of his widow \$4,000, the interest upon which

is to be paid to her semi-annually during life, and he bequeathed to nephews and nieces legacies amounting to \$1,600, making the aggregate amount of legacies \$5,600, none of which can be paid without resorting to the real estate, which fact must have been as evident to the testator at the date of his will and at all times thereafter as it is now apparent to the court. Within the rule laid down in *McCorn v. McCorn* (100 N. Y. 511) the legacies bequeathed in the second, fourth, fifth and sixth divisions of the will are a charge upon the realty, and must be provided for out of the avails produced by a sale of it.

It is apparent, we think, from the face of the will, taken in connection with the situation of the testator's estate, that he must have intended that his farm should be sold and converted into money within three years after his death and the legacies for the benefit of his widow, nephews and nieces provided for, and that one-fourth of the residue should be paid to the American Bible Society, and three-fourths of it to the trustees of the General Assembly of the United Presbyterian Church of North America; and that within three years after the death of his widow the house and lot should be sold, and the avails thereof, together with the \$4,000 invested for her benefit, be paid in like proportions to those corporations. When a will expressly confers power upon the executors to convert real estate into money, and it is evident that the testator contemplated that it must be done for the purpose of carrying the will into effect, and it appearing that in no other way can the intent of the testator be effectuated, the realty will be deemed to have been converted into personalty. (*Hood v. Hood*, 85 N. Y. 561; *Lent v. Howard*, 89 id. 169; *Moncrief v. Ross*, 50 id. 431; *Fisher v. Banta*, 66 id. 468; *Clift v. Moses*, 116 id. 144.)

This will does not, in express terms nor by implication, confer upon the executors power to determine whether or not a sale shall be made, but vests them with discretion when, within specified periods, both pieces shall be sold. Nor can the inference be drawn from the will and the situation of the

estate that he did not absolutely intend to require his executors to convert his realty into personalty for the purpose of carrying out his intentions, for as before stated, in no other way could he have anticipated that they could be carried into effect. The eighth and ninth divisions should be read as though separated by a comma and connected by the relative "which," it being clear that the testator in the ninth and subsequent divisions referred to the avails of his estate after payment of debts, charges, funeral expenses, legacies and expenses of administration mentioned in the eight divisions.

This case is not within the reason of *Scholle v. Scholle* (113 N. Y. 261), in which every devise and legacy could be satisfied without a conversion of the realty into money, while in the case at bar none of them except the devise of the life estate in the house and lot to the widow can be without a conversion. A conversion being absolutely indispensable to carry out the purposes of the testator, and a power to convert being expressly given to his executors, it must be held that it was his intention that the realty should be sold for the purpose of carrying out the provisions of his will.

The judgment is modified as follows: (1) The part which adjudges: "That under the said will there is no equitable conversion of any of the real estate into personal property," is reversed, and it is adjudged that the realty of which the testator died seized is converted into personalty. (2) The part which adjudges: "That the portion of the real estate of said John McNaughton, mentioned in said items numbers 10, 11 and 12 of his will, are not disposed of by said will, but descend to his heirs at law," is modified by adding thereto the words "subject to the power and duty of the executors to sell and subject to the trusts declared in the 8th, 9th, 10th, 11th and 12th divisions of the will." (3) It is adjudged to be the duty of the executors to sell the farm and out of the avails pay the costs allowed in this action, and subject to the claims of creditors pay the legacies for the benefit of the widow, nephews and nieces, and one-fourth of the residue (subject to the limitation of chapter 360, L. 1860) to the American

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Bible Society, and three-fourths of the residue, subject to the limitation of that chapter, to the Trustees of the General Assembly of the United Presbyterian Church of North America. (4) After the death of the widow the house and lot and household furniture must be sold and the avails thereof together with the sum invested for her benefit paid (subject to the limitation of chapter 360, L. 1860), in like proportions to said corporations. (5) That part of the judgment which awards to the guardian *ad litem* \$68.38 costs against the Trustees of the General Assembly of the United Presbyterian Church of North America is reversed, and it is adjudged that said costs be paid to said guardian *ad litem* out of the estate. The Trustees of the General Assembly of the United Presbyterian Church of North America are allowed taxable costs in the General Term and in this court payable out of the estate, and the guardian *ad litem* is allowed taxable costs in this court payable out of the estate.

The judgment as so modified is affirmed.

All concur.

Judgment accordingly.

DAN. H. DAVIS, Respondent, v. JOHN M. GALLAGHER et al.,
Administrators, etc., Appellants.

An admission by an administrator or executor is not binding as against the estate, unless made while he was engaged in his representative capacity in the performance of a duty to which the admission was pertinent so as to constitute it a part of the *res gesta*.

In an action upon an account against an estate for work and labor, goods sold, etc., it appeared that by an arrangement between plaintiff and defendants, the administrators of the estate, two persons were called in for the purpose of attempting a settlement of the claim; that at the request of one of them plaintiff made a statement of his claim, *i. e.*, as to the period of time he had worked for decedent and the value of his services, also the transactions between him and the decedent in reference to the other items of the account. Plaintiff, as a witness in his own behalf, and others were permitted to testify, under objection and exception, as to what was said by him on that occasion. The testimony was allowed for the purpose of showing admissions by defendants, who it appears, when the statement was made, sat by in

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silence, making no objection, except as to two or three items. G., one of the administrators, testified that he had no prior knowledge of any of the items. *Held*, that the reception of the testimony was error; that silence under the circumstances did not amount to an admission, and if it could be so considered it was not binding, as the statements related to past transactions, and so constituted no part of the *res gesta*; also that as regards plaintiff's testimony it was incompetent under the Code of Civil Procedure (§ 829).

Davis v. Gallagher (55 Hun, 593), reversed.

(Argued March 2, 1891; decided March 17, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 11, 1890, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

J. W. Shea for appellants. There is no evidence in this case showing an express contract on the part of Price to pay for Davis' services, nor a request on the part of Price that Davis should render him any services, and no promise to pay can be implied. (*Hartman's Appeal*, 3 Grant's Cas. 421; *Shakespeare v. Markham*, 72 N. Y. 400; *Wilcox v. Wilcox*, 48 Barb. 329; *Conger v. Van Armin*, 43 id. 602; *Williams v. Hutchinson*, 5 id. 124; *Dye v. Kerr*, 15 id. 444; *Robinson v. Cushman*, 2 Den. 153; *Williams v. Hutchinson*, 3 N. Y. 312; *Sharp v. Cropsey*, 11 Barb. 224; *Row v. Hardin*, 79 N. Y. 90, 91; 2 Pars. on Cont. 46; *Sullivan v. Sullivan*, 6 Hun, 658; *Van Kurn v. Sutton*, 3 id. 547; *Lyon v. Smith*, 35 id. 275; *Carpenter v. Welles*, 15 id. 134; *Ross v. Hardin*, 79 id. 90; *Furman v. Van Sise*, 56 N. Y. 435; *Simpson v. Bush*, 5 Lans. 337; *Gray v. Durland*, 50 Barb. 100.) The referee erred in allowing plaintiff to testify as to the cows, teams and as to whether he went to school or not, over objections of defendant. (*Fisher v. Ver Plank*, 17 Hun, 150; *Parks v. Andrews*, 56 id. 391; *Clift v. Moses*, 112 N. Y. 427; *Dyer v. Dyer*, 48 Barb. 190; Code Civ. Pro. § 829.) The evidence of Kate M. Price as to personal transactions

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and communications with deceased were not proper evidence in favor of plaintiff. (*Church v. Howard*, 17 Hun, 5; 79 N. Y. 415; *Hill v. Hotchkiss*, 23 Hun, 414; *Connelly v. O'Connor*, 117 N. Y. 91; *Shepard v. Wright*, 113 id. 382; *In re Eyseman*, Id. 62; *Clift v. Moses*, 112 id. 426; *Wilcox v. Corwin*, 117 id. 500; *Miller v. Montgomery*, 78 id. 285; *Hobart v. Hobart*, 62 id. 82; *Eisenlord v. Eisenlord*, 49 Hun, 340; *Alveader v. Dutchess*, 70 N. Y. 385.) The admissions of one executor are not received as against his co-executor. (*Harmon v. Huntley*, 4 Cow. 493; *James v. Huckley*, 16 Johns. 277; *Forsyth v. Ganson*, 5 Wend. 558; *Lane v. Doty*, 5 Barb. 535; *Elwood v. Deifendorf*, 5 id. 407; *Bruyn v. Russell*, 52 Hun, 17; *Finnern v. Hinz*, 38 id. 465; *Potter v. Greene*, 20 N. Y. S. R. 410.) It was error to allow evidence of what was said and done before the arbitrators to be given upon the trial. (Code Civ. Pro. § 829; *Howell v. Taylor*, 11 Hun, 214; *Cornell v. Cornell*, 12 id. 312; *Houghey v. Wright*, Id. 179; *Hills v. Heermans*, 17 id. 470; *Elwood v. Deifendorf*, 5 Barb. 407; *Bruyn v. Russell*, 52 Hun, 17; *Finnern v. Hinz*, 38 id. 465; *Wilcox v. Corwin*, 117 N. Y. 500.) An executor or administrator has not only no power to bind the estate by a new contract, but he cannot revive a demand which has once expired; neither his contracts nor admissions can have the effect of creating the one or reviving the other. (*Barry v. Lambert*, 98 N. Y. 300; *Austin v. Morris*, 47 id. 366; *Ferrin v. Myrick*, 41 id. 315; *McLaren v. McMartin*, 36 id. 88; *Glenn v. Barrows*, 37 Hun, 602; *Fellows v. Fellows*, 37 N. H. 75; *Crandall v. Gallup*, 12 Conn. 365; *Elwood v. Deifendorf*, 5 Barb. 398.) The conversation and statements made before the arbitrators were statements in relation to past transactions between plaintiff, an interested person, and the deceased and in no sense a transaction or the *res gestæ* of a transaction between plaintiff and the administrators. (*People v. Murphy*, 101 N. Y. 126; *Darling v. O. F. Mfg. Co.*, 30 Hun, 276; *Luby v. H. R. R. R. Co.*, 17 N. Y. 131; *Waldele v. N. Y. C. & H. R. R. R. Co.*, 95 id. 281; *White v. Miller*, 71 id. 118; *Finnern v. Hinz*, 38

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Hun, 465; *Bruyn v. Russell*, 52 id. 17; *Wilcox v. Corwin*, 117 N. Y. 500; *Harmon v. Huntley*, 4 Cow. 493; *Forsyth v. Ganson*, 5 Wend. 558; *McIntyre v. Morris*, 14 id. 97.) The order of confirmation should not have allowed costs, and should not have confirmed said report, but on the contrary should have set the same aside. (*Russell v. Fry*, 19 Hun, 595; *Johnson v. Meyers*, 103 N. Y. 666; Code Civ. Pro. § 1836.)

C. C. Brown for respondent. The facts alone lead to the conclusion that both Mr. Price and plaintiff understood and intended that plaintiff was to have pay for his services, and that Mr. Price actually paid plaintiff for his services up to the time he was twenty-three years of age, and sustain the referee in finding that for services rendered by plaintiff for Mr. Price after that time there was an implied promise to pay therefor. (*Conger v. VanAernum*, 43 Barb. 602-606; *Quackenbush v. Ehle*, 5 id. 469; *Jacobson v. Executors, etc.*, 3 Johns. 199; *Green v. Roberts*, 47 Barb. 521; *Martin v. Wright*, 13 Wend. 460, 463; *Mackey v. Brewster*, 10 Hun, 16; 70 N. Y. 607; *Shakespeare v. Markham*, 10 Hun, 323; 72 N. Y. 400; *Eaton v. Benton*, 2 Hill, 578; *Robinson v. Raynor*, 28 N. Y. 494, 496.) The referee found at the request of the defendants that the arbitration has no binding effect upon the defendants herein, and what took place before them was allowed in evidence only to show what was said and done in the presence of the parties for the purpose of proving admissions by the defendants. For this purpose the testimony was competent. (*Church v. Howard*, 79 N. Y. 415, 419; *Whiton v. Snyder*, 88 id. 299, 307.) The exception taken to the admission in evidence of the testimony of plaintiff to a conversation had between him and the deceased was made competent by the cross-examination of plaintiff. (*Nay v. Curley*, 113 N. Y. 575, 582.) The widow was a competent witness, and she was not prohibited from testifying under section 829 of the Code of Civil Procedure. (*Carpenter v. Soule*, 88 N. Y. 251, 257; *Whitehead v. Smith*, 81 id. 152.)

HAIGHT, J. This action was brought to recover pay for services rendered by the plaintiff and his wife to the defendants' intestate during his life-time, and also for hay, corn, beans pasture, cow, etc., had by such intestate.

It appears that the plaintiff was a step-son of the deceased, and had lived in his family from the time he was eight years of age; that a few days after letters of administration had been issued to the defendants the parties had a conversation in reference to the plaintiff's claim and then arranged to call in two neighbors, Mr. Calkins and Mr. Niles, to see if they could arrange a settlement; that on the following day there were present at the house of Mr. Price, Messrs. Calkins, Niles, Gallagher and wife, Mrs. James L. Price, Miss Bumpus, Mr. Lewis Price and the plaintiff; that thereupon the plaintiff was called upon by Calkins to make a statement in reference to his claim and he did so, giving the extent of time that he had worked for the deceased after he became twenty-one years of age; the amount that such services were worth; the transactions in reference to the corn, hay, pasture, cow, etc., with an account of the services of his wife, and other matters involving personal transactions with the deceased.

Upon the trial of this action the plaintiff was called as a witness in his own behalf and was permitted to state what had been said by him on the occasion referred to, under the objection and exception of the defendants. This evidence was allowed for the purpose of showing admissions by the defendants. It appears that they sat by in silence making no objections except in reference to two or three items, and it is claimed that by maintaining silence they are deemed to have admitted that the statements and claims of the plaintiff were true and well founded. Calkins and Niles were also called upon and allowed to give similar evidence in reference to the statements made by the plaintiff.

We do not regard this evidence competent. It is not only hearsay, but much of it is in violation of the provisions of section 829 of the Code of Civil Procedure. By permitting this class of evidence to be given the plaintiff was enabled to estab-

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lish his claim against the estate of the deceased by showing what he had said on a former occasion when not under oath. It is true that he seeks to justify this upon the theory that the defendants sat by, listened to it and made no objection; that Calkins had said to the defendants that they could make their objections as the plaintiff proceeded with his statement; but Gallagher testified that he had no prior knowledge of any of the items of the plaintiff's claim against the estate. If he had no prior knowledge in reference to such claims he could not be expected to be in a condition to make objection to the statements made by Davis, and his remaining silent whilst the plaintiff was making his statement to the neighbors could hardly be construed into an admission that his claims were just. But if we should construe the silence of the defendants as indicating an intention to admit the statements of the plaintiff even then we think the evidence would be incompetent. Ordinarily an admission by one administrator is not binding upon his co-administrator as against the heirs or devisees of the deceased. (*Elwood v. Deifendorf*, 5 Barb. 398-406; *Hammon v. Huntley*, 4 Cowen, 493; *Cayuga County Bank v. Bennett*, 5 Hill, 236; *Whiton v. Snyder*, 88 N. Y. 299.)

But there are cases in which the admissions or declarations of administrators and executors may be evidence, as, for instance, where they are made while engaged in the performance of a duty pertaining to the estate in a representative capacity, in which the declaration is pertinent and accompanies the act so as to constitute a part of the *res gestæ*. (*Church v. Howard*, 79 N. Y. 415-419.)

The administrators were engaged in trying to settle a disputed claim against the estate. They may, therefore, be said to have been acting in their representative capacity and in the discharge of their duty, but the claims of plaintiff under consideration related to past transactions with their intestate, and as Gallagher has testified pertaining to matters not within his personal knowledge. No admission, therefore, if made by him, would constitute a part of the *res gestæ*.

Res gestæ is the transaction or subject-matter. What was

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said and done at the time of the transaction, out of which it is claimed the liability was incurred, may be given in evidence as part of the *res gestæ*, thereby showing the true character of the transaction. A declaration, in order to become *res gestæ*, must be made contemporaneously with the event sought to be proved, or else be so closely connected with it as to become a part thereof.

It consequently follows that the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur except FOLLETT, Ch. J., not voting, and VANN, J., not sitting.

Judgment reversed.

EMILY FORD, as Administratrix, etc., Respondent, v. THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Appellant.

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While an employe, by entering into the employment, assumes and assents to the ordinary risks incident thereto, this does not release the employer from the duty to take reasonable precautions to insure the servant's safety while in the discharge of his duties, and when the latter is injured because of failure to perform this duty, the master is liable.

A corporation is bound to carry on its business under a proper system and under reasonable rules and regulations, and if, through a failure to establish such system or to make such rules, a servant is injured, the corporation is liable.

It is the duty of a railroad company, transporting lumber upon open cars, to adopt some system for loading, having regard for the safety of its servants, and, *it seems*, of those traveling over its road and of all persons who may be in the vicinity of such cars.

In an action to recover damages for the alleged negligent killing of F., plaintiff's intestate, who was a switchman in defendant's employ, it appeared that he was killed while at his post of duty by being struck by heavy timbers that fell from a passing open car which was improperly loaded. Defendant furnished good cars and stakes, but it had no rule, method or system in reference to the loading of lumber or timber; the manner of loading being left to the discretion of its employes. It had adopted a general rule requiring its employes "to attend to the loading of all freight, whether loaded by station men or by shippers, to see that it is safely stored, and so that it cannot fall off the cars." Plaintiff proved that on other roads a verbal rule existed requiring that in all

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cases, no matter how short the distance, lumber, whenever loaded above the sides of a car, should be secured by stakes on the sides and stays over the top. *Held*, that the evidence justified the submission to the jury of the question as to whether defendant had made a proper and sufficient rule with respect to the loading of cars with lumber; and that a finding in the negative was sufficient to sustain a verdict against it.

Ford v. L. S. & M. S. R. Co. (117 N. Y. 638), distinguished.

(Argued March 2, 1891; decided March 17, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made December 31, 1890, which affirmed a judgment in favor of plaintiff, entered upon a verdict directed by the court upon special findings of fact, and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for negligently causing the death of the plaintiff's husband, a switchman in the employ of the defendant.

On the night of May 29, 1887, while at his post of duty he was struck by heavy timbers which fell from a passing car and received injuries from which he soon after died.

The case has been once before in this court (117 N. Y. 638; 27 N. Y. S. R. 246), and the material facts are very fully stated in the opinion of Judge EARL there delivered.

The further facts, so far as material to the questions here discussed, are stated in the opinion.

James Fraser Gluck for appellant. There was no evidence of incompetency to submit to the jury. A single act of negligence does not of itself establish incompetency. (*Baulec v. N. Y., etc., R. R. Co.*, 59 N. Y. 356; 2 Thompson on Neg. 1053, 1054; *Cooper v. Milwaukee R. R. Co.*, 23 Wis. 668; *Davis v. D. R. Co.*, 20 Mich. 105; *C., etc., R. Co. v. Hoffman*, 17 Am. & Eng. R. R. Cas. 625; *Slater v. Jewett*, 85 N. Y. 73; *Wright v. N. Y. C. R. R. Co.*, 25 id. 562, 570.) The defendant provided, made and promulgated a proper and sufficient rule with respect to the loading of the cars with lumber, including the car from which the lumber fell, which, if faithfully observed, would have given reasonable protection

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to its employees. (*Wright v. N. Y. C. R. R. Co.*, 25 N. Y. 562.) The question submitted by the court to the jury assumed that a rule was provided and submitted as a question of fact whether the rule of the defendant was proper and sufficient, and whether such rule had been promulgated as a question of fact. This was error. (*Wright v. N. Y. C. R. R. Co.*, 25 N. Y. 562; *Rose v. B. & A. R. R. Co.*, 58 id. 217; *Slater v. Jewett*, 85 id. 61; *Abel v. D. & H. C. Co.*, 103 id. 581; *Avery v. N. Y. C. & H. R. R. Co.*, 121 id. 44, 55; *Groat v. Gile*, 51 id. 431.) Having made rules, it was not part of the master's duty to attend to the obedience of the regulations. (*Slater v. Jewett*, 85 N. Y. 72; *Rose v. B. & A. R. R. Co.*, 58 id. 217.) The exception to the refusal of the court to have Mr. Seabert's testimony in regard to the usage upon the witness's road stricken from the case was valid. Proof of such usage did not establish or tend to establish the making or promulgation of a rule in any sense of the word. The testimony was utterly incompetent for any such purpose, and should have been, therefore, excluded from the case. (*Abel v. D. & H. C. Co.*, 103 N. Y. 581.)

Tracy C. Becker for respondent. The defendant did not provide, make and promulgate a proper and sufficient rule with respect to the loading of the cars with lumber, including the car from which the lumber fell, which, if faithfully observed, would have given protection to its employees. (*Skinner v. Russell*, 25 Wkly. Dig. 261; 42 Hun, 456; *Bushby v. N. Y., L. E. & W. R. R. Co.*, 107 N. Y. 383; *Abel v. D. & H. C. Co.*, 103 id. 581; *Anthony v. Lareat*, 105 id. 591; *McGovern v. R. R. Co.*, 123 id. 281.) The evidence of the witnesses Seabert and Brunn in regard to the rules and regulations of other railroads was admissible, and its reception proper. (*Abel v. R. R. Co.*, 103 N. Y. 586; *Spooner v. D., L. & W. R. R. Co.*, 115 id. 32; *Lewis v. Seifert*, 116 Penn. St. 628, 650; *Danna v. N. Y. C. R. R. Co.*, 92 N. Y. 639; *Kemble v. N. Y. C. R. R. Co.*, 35 Hun, 506, 507; 1 Wkly. Dig. 545, *Skinner v. Russell*, 25 id. 261; 42 Hun, 456.) Defendant's

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rules and alleged usages were so blind and uncertain that the jury were warranted in finding they were insufficient. (*Skinner v. Russell*, 25 Wkly. Dig. 261; 42 Hun, 456.)

BROWN, J. Upon the first appeal of this case the judgment which the plaintiff had recovered was reversed by this court on the ground that the cause of the accident was attributable solely to the negligence of the fellow servants of the deceased in improperly loading the lumber upon the cars.

There was then no question whether the defendant was guilty of negligence in failing to establish a proper rule or method for the loading of lumber.

The court on the first trial charged the jury that there was no evidence that the defendant was called upon to establish any system of rules which should provide for any different or safer method in the loading of the lumber than that described by the witnesses, and as the plaintiff had a verdict, no question was or could be raised on appeal as to the correctness of that charge.

Upon the last trial it appeared that the only written rule that the defendant had established which it was claimed had reference to the loading of lumber was one known as No. 82, and which required its employes "to attend to the loading of all freight, whether loaded by station men or by shippers, to see that it is safely stored, and so that it cannot fall off the cars."

It appeared that the defendant had also furnished to its employes stakes to be used in making secure freight placed upon flat or gondola cars, and the witnesses for the defendant, who had loaded or inspected the cars in question, testified that they knew that stakes were necessary in making the lumber secure, and that when there were no brackets on the side of the cars, as in this case, the stakes could be placed inside the box between the side of the car and the lumber, and fastened by being nailed or spiked to the side. But that course was not pursued in this case, for the reason that on account of the short distance the lumber was to be carried it was not deemed necessary.

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The plaintiff also gave proof tending to show that on other roads a verbal rule existed, that in loading lumber it should be secured by stakes on the sides and stays across the top of the load whenever it was loaded above the side of a car, and that the rule applied in all cases, no matter what the distance was over which the lumber was to be carried.

That no verbal rule of this character prevailed on defendant's road, and no instruction to that effect was ever given to its employees. This testimony was not given upon the first trial.

At the close of the evidence the trial court submitted eight special questions to the jury, stating that upon the answers to those questions it would determine which party would be entitled to judgment.

Upon the special findings thus made judgment was directed for the plaintiff.

This mode of submitting the case to the jury was acquiesced in by both parties, but the defendant claimed and now claims that there was not evidence sufficient to justify a verdict for the plaintiff, and that the complaint should have been dismissed, and by appropriate exceptions the question is presented here whether the findings of the jury have support in the evidence.

That the car in question was improperly loaded and that such was the cause of the intestate's death, and that he was free from any negligence contributing to the injury, are facts found by the answers to the first three questions and are not disputed on this appeal.

The seventh and eighth findings related to the question of plaintiff's damages and the amount. The fifth question was as follows: "Did the defendant provide, make and promulgate a proper and sufficient rule with respect to the loading of the cars with lumber, including the car from which the lumber fell, which if faithfully observed, would have given reasonable protection to its employees." Which question the jury answered in the negative.

We are of the opinion that the answer to this question supports the judgment rendered.

The intestate, upon entering the defendant's employ, assumed and assented to the ordinary risks incident to the service. But employers cannot avail themselves of this assent unless they take reasonable precautions to insure the servant's safety while in the performance of his duties, and there can be no exemption from liability for injuries sustained by a servant, when such injuries are traced to the employer's failure to take such precautions.

Within the operation of this principle a corporation is bound to carry on its business under a proper system and under reasonable rules and regulations, and if through a failure to establish such, a servant is injured, the corporation is liable.

The master is responsible for his own negligence and want of care and this may appear from his failure to furnish proper machinery and materials for the work, or from the employment of incompetent and unfit servants and agents, or from a failure to make proper rules or establish a proper method for the conduct of his business.

These are the master's duties, and responsibility cannot be evaded by their delegation to agents. As to such acts, the agent occupies the master's place and the latter is deemed present and liable for the manner in which they are performed. (*Flike v. B. & A. R. R. Co.*, 53 N. Y. 549; *Fuller v. Jewett*, 80 id. 46.)

In the case before us it was clearly the duty of the defendant to adopt some system for the loading of lumber upon open cars that would have regard for the safety not only of its servants and those traveling over its road, but to the safety of all persons who should be in the vicinity of its cars. The importance and extent of the business and the manifest danger from the falling of heavy sticks of timber from the cars, required this.

But there was no rule on the subject. The only rule shown to exist had no particular reference to lumber more than any other freight and it expressed nothing more than the obligation which the law put upon the corporation, viz.: to take due care that freight was safely loaded and should not fall from the car.

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But method or system as to loading lumber, there was none. Having furnished a good car and stakes that might be used, the manner of loading lumber was left to the judgment and discretion of its agents and servants.

It was not sufficient for the defendant to show that its employes knew that the rule I have quoted applied to lumber and also knew that the general usage required it to be staked and that stakes were furnished and available to the men in the particular case before us. All this may be assumed to be true and yet the fact exists that the use of the stakes was not enjoined upon the servants by any rule of the defendant or by any instruction ever given them. Having furnished the car and the stakes it was left to the judgment and discretion of the foreman whether to use the stakes or not, and in this particular instance they were not used for the reason that they supposed the lumber would stay on the car over the short distance it was to be carried. And it is because of the failure of the defendant to require the use of the stakes in all cases that the neglect of its servants in this case is imputed to it. There was no rule, and the only method or system was such as the foreman in each particular case should deem the safe and proper one to pursue.

Under such a state of facts the employer must be deemed constructively present during the loading of the cars, and the acts of his agents are in law deemed to be his acts.

The improper and negligent loading of the cars is thus traced directly to the defendant and its negligence established.

Thus far I have treated the construction of rule 82 as a question of law, but in the question submitted to the jury there was opportunity for a finding of fact that the making of that rule was a sufficient performance on the part of defendant of its duties towards its servants, and it is unnecessary to say more upon the exception of the defendant to the submission of that question as one of fact to the jury, than that it was a ruling as favorable towards it as the facts of the case warranted.

The view of the case herein expressed renders unnecessary

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any reference to the other findings of the jury, which the respondent claims established the negligence of the defendant.

We find no error in the record and the judgment should be affirmed.

All concur, except FOLLETT, Ch. J., dissenting.

Judgment affirmed.

THE PEOPLE ex rel. ABRAM J. MILLER, Respondent, v. HILLYER
RYDER, as County Treasurer, etc., Appellant.

While the legislature has power to change rules of evidence and to provide other and new remedies, laws of this character, intended to have a retroactive operation, must be strictly construed, especially in so far as they provide for the vesting of property.

The provision of the Code of Civil Procedure (§ 841, as amended by chap. 40, Laws of 1889), providing that whenever in an action of partition any portion of the proceeds of sale of the lands has been paid into court or to the county treasurer for any unknown heirs, and remains unclaimed for twenty-five years, such unknown heirs will be presumed to be dead, in any action or proceeding for the distribution and paying over of such proceeds, refers only to unknown heirs who were presumed to be living at the time the money was so paid in, and under said section said unknown heirs may be presumed to have continued to live for twenty-five years after the payment, during which time new heirs may have come into existence, and these may not be presumed to be dead at the expiration of that period.

The provision, therefore, of said Code (§ 1582, as amended by chap. 39, Laws of 1889), authorizing the Special Term in an action for partition, in which a portion of the proceeds of a sale has been paid into court or deposited with the county treasurer for unknown heirs and twenty-five years have elapsed without any claim being made therefor by any person entitled thereto, "to decree that such unclaimed portion of such proceeds was vested at the time of such payment in the known heirs of the common ancestor of such unknown heirs and their heirs and assigns," is unconstitutional, as it authorizes the court to divest unknown heirs who may exist and who are not presumed to be dead, and to vest other and different persons with said fund, and thus deprives persons of their property without due process of law.

People ex rel. Miller v. Ryder (58 Hun, 407), reversed.

(Argued March 4, 1891: decided March 17, 1891.)

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APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 8, 1890, which affirmed an order of the Special Term directing a peremptory writ of mandamus to issue to the defendant requiring him to pay over certain moneys in obedience to an order theretofore made in an action brought to partition real estate in which Matilda Cree was plaintiff and Cornelius Griffen and others were defendants.

The facts, so far as material, are stated in the opinion.

Clayton Ryder for appellant. The fund in question is the proceeds of a sale of real estate in partition. At the time of sale it was vested in the descendants of Deborah Ann McCormick, whose names and places of residence were unknown, and, aside from the effect of the statutes of 1889, it remained vested in them, and the persons claiming through them, and so remains to the present time. (*Robinson v. McGregor*, 16 Barb. 531; *Horton v. McCoy*, 47 N. Y. 21; *Sweezy v. Thayer*, 1 Duer, 286; *Graham v. Dickinson*, 3 Barb. Ch. 169; *People v. O'Brien*, 111 N. Y. 1, 57.) The effect of chapter 39 of the Laws of 1889, under which the fund is now claimed, is to take the title to the fund from the McCormick branch and their legal representatives, and to vest the same in persons who, prior to that time, had no vested interest in it whatever. The statute thereby affects substantial rights and is contrary to the constitutional provision that no person shall be deprived of his property without due process of law. (Const. N. Y. art. 5, § 6; *Burr v. Sim*, 4 Whart. 150; *Hopewell v. DePinna*, 2 Camp. 113; *Dean v. Bittner*, 77 Mo. 101; *Eagle v. Emmett*, 4 Brad. 117; *Whiting v. Nicholl*, 46 Ill. 235; *Clarke v. Canfield*, 15 N. J. Eq. 119; *White v. White*, 26 Me. 361; *Merritt v. Thompson*, 1 Hilt. 550; *Puckett v. State*, 1 Sneed, 355; Wood's Best on Ev. 524; *Taylor v. Porter*, 4 Hill, 157; *Wilkinson v. Leland*, 2 Pet. 657; 2 Kent's Comm. 13, 340; *Westervelt v. Gregg*, 12 N. Y. 212; *Rockwell v. Nearing*, 35 id. 302; *Stuart v. Palmer*, 74 id. 183; *Remsen v. Wheeler*, 105 id. 573; *City of Detroit v. D. & F. P. Co.*, 43 Mich.

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140; *Dash v. Van Vleeck*, 7 Johns. 477; *People v. O'Brien*, 111 N. Y. 1, 58; *Waltermire v. Westover*, 14 id. 16; *Johnson v. A. & S. R. R. Co.*, 54 id. 427; *Howard v. Moot*, 64 id. 268.) Chapter 40 of the Laws of 1889, raising the presumption of the death of the unknown heirs after twenty-five years, is unconstitutional, and unavailable in this proceeding, so far as it forms a step in the scheme to appropriate their property. (*Hand v. Ballou*, 12 N. Y. 541; *People v. Turner*, 117 id. 233; *Cummings v. State*, 4 Wall. 277, 325, 329; *People ex rel. v. Albertson*, 55 N. Y. 50, 55, 57, 67; *In re Jacobs*, 98 id. 98; *People ex rel. v. Allen*, 42 id. 404, 412, 413.)

Abram J. Miller for respondent. The proceeding is valid and the order should be sustained. (Code Civ. Pro. § 841.) Section 1582 of the Code of Civil Procedure, under which the order herein was made, is constitutional. (*Hand v. Ballou*, 12 N. Y. 541; *People v. Turner*, 117 id. 233; *Mongeon v. People*, 55 id. 613; *People ex rel. v. Spicer*, 99 id. 233; *Howard v. Moot*, 64 id. 268.

HAIGHT, J. Lewis B. Griffen died intestate seized of real estate in Putnam county. Subsequently and in September, 1862, an action was brought for the partition thereof and such proceedings were had thereon that in April, 1863, a judgment for the sale thereof was entered and on or about the nineteenth day of December thereafter the same was sold and the sum of \$6,480, or one-fifth of the net proceeds of the sale was brought into court and deposited with the treasurer of the county of Putnam as the share of the unknown heirs of Deborah Ann McCormick, a deceased sister of the said Lewis B. Griffen. On the 8th of February, 1890, the relator and others presented a petition to the Supreme Court representing that more than twenty-five years had elapsed since the payment of the before-mentioned sum into court; that no claim had been made therefor; that due inquiry for such unknown heirs had been made and none found, and prayed that such fund with the accumulations thereon may be distributed among the known heirs of

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Deborah Ann McCormick. Thereupon a decree was made by the court declaring that such unclaimed proceeds with the accumulations of interest thereon amounting to the sum of eighteen thousand dollars was vested at the time of the payment into court of such proceeds in such known heirs. The decree further provided for the distribution of such proceeds among such heirs specifying them by name and the treasurer was directed to pay over such fund to the persons named. The treasurer having refused to make such payment the mandamus in question was issued.

Section 1582 of the Code of Civil Procedure, as amended by chapter 39 of the Laws of 1889, provides as follows: "Where a person has been made a defendant as an unknown person; or where the name of a defendant is unknown; or where the summons has been served upon a defendant without the state, or by publication, and he has not appeared in the action; the court must direct his portion to be invested in permanent securities, at interest, for his benefit, until claimed by him or his legal representatives. But after the lapse of twenty-five years from the time of the payment into court, or to the treasurer of any county, of any portion of the proceeds of the sale of real property for unknown heirs, in any action of partition, without any claim therefor having been made by a person entitled thereto, and upon there being made and presented to the court, at a Special Term thereof, proof, by petition or otherwise, showing to the satisfaction of the court, that due inquiry for such unknown heirs has been made, and that no claim has been made for such portion of said proceeds by any person entitled thereto, the said court shall have power to decree that such unclaimed portion of such proceeds was vested at the time of such payment, in the known heirs of the common ancestor of such unknown heirs, and their heirs and assigns, and shall make an order in such action, directing the payment to them, or their assigns, of the respective shares or portions of, or interests in, such proceeds, to which they are entitled; and upon serving on the county treasurer a certified copy of such order, the treasurer shall so pay over and distribute the same,

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after deducting his lawful commissions, and shall thereupon be exempt from all liability on account thereof."

And section 841, as amended by chapter 40 of the Laws of 1889, among other things, provides as follows: "And where, in any action of partition in this state, any portion of the proceeds of the sale of real property is, or has been, paid into court, or paid to the treasurer of any county, for any unknown heirs, and is unclaimed for twenty-five years, the lapse of twenty-five years after such payment raises the presumption of the death of such unknown heirs, and they are and shall be presumed to be dead in any action or proceeding for the purpose of distributing and paying over such proceeds."

Undoubtedly these provisions of the Code should be construed together, and we do not question but that the legislature has power to change rules of evidence as they have previously existed, and to provide other and new remedies. (*People v. Turner*, 117 N. Y. 227-233; *Howard v. Moot*, 64 id. 262; *Hand v. Ballou*, 12 id. 541; *Rexford v. Knight*, 11 id. 308.)

But laws of this character which were intended for retroactive operation should be strictly construed, especially in so far as they provide for the vesting of property.

At the time the money was brought into court, under the decree in the partition action, the presumption existed that there were unknown heirs then living of Deborah Ann McCormick. Under the provisions of section 841 it will be observed that such unknown heirs are presumed to be dead after the lapse of twenty-five years, but the provision only covers the unknown heirs that were presumed to be living at the time the money was paid to the treasurer. Heirs of such heirs may exist, and under the provisions they cannot be presumed to be dead. A person is presumed to be living until the time fixed by the statute in which he shall be presumed to be dead. (Lawson on Presumptive Evidence, 200.)

The unknown heirs, therefore, who were presumed to be living at the time of the payment to the treasurer are presumed to have continued to live for twenty-five years there after, during which time many new heirs may have come into existence.

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Under the provisions of section 1582 of the Code the court is given power to decree that such fund was vested at the time of such payment in the unknown heirs of the common ancestor, thus authorizing and empowering the court to divest the unknown heirs that may exist and who are not presumed to be dead, and to vest other and different persons therewith.

This would be violative of the constitutional provision which inhibits the deprivation of persons of their property without due process of law.

Had the legislature provided that after the lapse of twenty-five years it should be presumed that there were no unknown heirs living at the time the money was paid to the treasurer, a different question would have been presented.

The order appealed from should be reversed and the application for a mandamus denied, with costs in this court and the General Term, together with fifty dollars costs in the Special Term to the defendant.

All concur.

Order reversed.

CARL R. C. HEYNE, Respondent, *v.* JOHN DOERFLER, as
Executor, etc., Appellant.

The words "transactions and communications" in the provision of the Code of Civil Procedure (§ 829), prohibiting evidence as to personal transactions and communications between certain persons and a deceased person embrace every variety of affairs which can form the subject of negotiations, interviews or actions between two persons, and include every method by which one person can derive impressions or information from the conduct, condition or language of another.

Although, it must appear that the transaction or communication sought to be excluded was a personal one, it is not requisite to show that it was private or confined to the witness and deceased.

Upon a reference of a claim by plaintiff against the estate of A. for the board and care of two relatives of A., and professional services as nurse rendered for A., the referee allowed plaintiff to testify, under objection and exception, that he conversed with A. in reference to said relatives boarding with him, in the presence of one of them, and that he was to

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receive \$200 therefor; also, that he was at the house of A. many times, and for several periods of consecutive days, and at those times no other person was generally there, except A.'s attending physician. *Held*, error.

(Argued March 5, 1891; decided March 20, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made the second Monday of September, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee appointed under the statute to hear and determine a claim against the estate of Maria F. Arlt, deceased.

The amount of the claim as presented by the plaintiff, was \$611, and is made up of two charges. One of them is for the board of Anna John and Emil John; the other is for professional services rendered as nurse by plaintiff for the deceased for various periods of time between June 2, 1887, to March 18, 1888.

The referee reported in favor of the plaintiff to the amount of \$350 of the claim, allowing the whole of the \$200 claimed for board, and a portion only of the claim for services as nurse.

Further facts appear in the opinion.

H. D. Birdsall for appellant. The ruling permitting an answer to the question, "Before Emil and Anna came to your house did you have a conversation with Mrs. Arlt in reference to their coming?" was error. (*Maverick v. Marvel*, 90 N. Y. 656; *Holcomb v. Holcomb*, 95 id. 316, 325; *In re Eysaman*, 113 id. 62; *Nay v. Curley*, id. 575.) The exception to the ruling permitting an answer to the question "What did Mrs. Arlt say when Anna John was there?" was well taken. (Code Civ. Pro. § 829; *Adams v. Morrison*, 113 N. Y. 152; *Mills v. Davis*, id. 243.) The exceptions to the testimony of Dr. Ermentsaul were well taken. (*Loder v. Whelpley*, 111 N. Y. 239; *Westover v. E. L. Ins. Co.*, 99 id. 56; *Rehiham v. Dennin*, 103 id. 573.) The plaintiff was not entitled to costs. (Code Civ. Pro. §§ 1022, 1836; *Denise v. Denise*, 110 N. Y. 526.)

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Joseph A. Burr, Jr., for respondent. The plaintiff was asked whether, between January, 1887, and February, 1888, he was at any time at No. 200 Withers street, Brooklyn, and was permitted to prove when he was there. This was proper. (*Denise v. Denise*, 110 N. Y. 562; *Lerche v. Brasher*, 104 id. 157; *In re Merchant's Estate*, 6 N. Y. Supp. 875.) Counsel argued in the court below that the referee erred in allowing plaintiff to testify as to the dates when he was at 200 Withers street, upon the ground that his memory was not refreshed by the memorandum made by him, but that he simply read from it. The case does not show this to be the fact. But if it were so, the ruling was correct. (*Halsey v. Sinebaugh*, 15 N. Y. 485; *Guy v. Mead*, 22 id. 462; *Squires v. Abbott*, 61 id. 530-535; *Beck v. Valentine*, 94 id. 569; *Mayer v. S. A. R. Co.*, 102 id. 572-580.) The plaintiff was asked whether, before Emil and Anna John came to his house, he had a conversation with Mrs. Arlt in reference to their coming. The ruling permitting the answer was clearly correct. (*Hiers v. Grant*, 47 N. Y. 278; *Muverick v. Marvel*, 90 id. 656.) When a party calls a witness and examines him as to a particular part of a communication or transaction, the other party may call out the whole of the transaction or communication bearing upon, or tending to explain or qualify, the particular part to which the examination of the other party was directed, and section 829 of the Code was not intended to abrogate this rule. (*Nay v. Curley*, 113 N. Y. 575; *Merritt v. Campbell*, 79 id. 625; *Davis v. Gallagher*, 55 Hun, 593.) The point that the proof was not within the terms of the claim is not well taken. In any event, inasmuch as there are no pleadings, the court must look into the proofs to ascertain the grounds of the recovery or the defense. (*Raynor v. Laux*, 28 Hun, 35.) The court below had power to award costs to the claimant, and its action in doing so will not be reviewed by this court. (*Denise v. Denise*, 110 N. Y. 562.)

POTTER, J. The plaintiff sought to recover for his services and attendance upon proof that he had rendered services for

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and attended upon the deceased at her house during her sickness, and at her request and upon her promise to pay for the same at the rate he would have earned if he had worked at his business of making cigars. He also sought to recover the sum of two hundred dollars upon proof that the deceased had promised to pay him that sum if he would take and keep Anna and Emil John, relatives of the deceased, who had recently arrived at the house of the deceased from Germany, till they should get employment. The evidence introduced upon plaintiff's part to support these claims, including that given by the plaintiff himself, was weak and quite unsatisfactory, but under the rule that prevails in this court in respect to reviewing evidence, we do not feel warranted in reversing the judgment upon that ground. But we think the learned referee fell into errors in receiving some of the evidence given by the plaintiff himself in reference to personal transactions and communications between the plaintiff and the deceased bearing upon plaintiff's employment and a promise of payment by the deceased.

To support the claim of two hundred dollars, it was necessary that plaintiff should prove a contract between himself and the deceased, to the effect that plaintiff had agreed to keep at his house Anna and Emil John, and the deceased had promised to pay him two hundred dollars for so doing. There is no pretense that such contract, if made at all, was not wholly made by parol. The plaintiff was allowed to answer, under objection and exception, that such evidence by the plaintiff was not competent under section 829, Code of Civil Procedure, this question: "Before Emil and Anna came to your house, did you have a conversation with Mrs. Arlt in reference to (their) coming?" Answer. "Yes, sir." This was one step towards proving the alleged contract between plaintiff and the deceased in relation to their going to plaintiff's house. Again, the plaintiff was asked and allowed to answer: "What did Mrs. Arlt say when Anna John was present?" Answer. "Aunt cried and said I should take her and I should receive \$200." This answer was received and duly excepted to. Again the plaintiff was allowed to put in evidence memoranda

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showing the days and periods of time he had been at the house of the deceased.

Some, if not all, of the evidence above specified was in contravention of section 829, Code of Civil Procedure.

The object and purpose of this statute is so obvious as not to require or justify any explanation or consideration beyond that which it has repeatedly received from this court. It was said in the opinion of the Court of Appeals in *Holcomb v. Holcomb* (95 N. Y. 325), in relation to section 829, that "The words of exclusion are as comprehensive as language can express. Transactions and communications embrace every variety of affairs which can form the subject of negotiation, interviews or actions between two persons, and include every method by which one person can derive impressions or information from the conduct, condition or language of another. The statute is a beneficial one, and ought not be limited or narrowed by construction. Although it must appear that the interview or transaction sought to be excluded was a personal one, it need not have been private or confined to the witness and deceased. If they participated, it does not change its character because others were present. A contrary rule would defeat the reasonable intent of the statute that a surviving party should be excluded as one interested from maintaining by his testimony an issue which in any degree involved a communication or transaction between himself and a deceased person."

It was incumbent upon the plaintiff, in order to maintain the claims in this case, to prove that the deceased engaged the plaintiff to keep and board Anna and Emil John, and to serve and nurse the deceased, and her promise to pay him therefor. For that purpose the plaintiff was allowed to prove that he conversed with the deceased with reference to their coming to plaintiff's house, and that he should receive from the deceased two hundred dollars therefor, and that he was at the house of the deceased in Brooklyn many times and for several periods of consecutive days, leaving his own house and business in New York for that purpose, and when there, generally no

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person other than the physician of the deceased in making professional visits, was present.

The plaintiff's attendance at the house of the deceased, under the circumstances proved in this case, was a personal transaction between the plaintiff and the deceased, and was of the utmost significance.

The testimony of the plaintiff as to the communications and transactions between himself and the deceased was pertinent to the issue upon the trial in this case, and could have had no relevancy to any other aspect of it. Indeed, I am inclined to the opinion that it exceeded in weight and cogency upon the issues all the other evidence in the case, and hence it cannot be successfully maintained that the objectionable evidence did no harm or that there was sufficient evidence without it to justify an affirmation of the judgment. (*In re Eysaman*, 113 N. Y. 62.)

As these views require a reversal of the judgment, there is no occasion to consider the objections to the introduction of the memoranda of plaintiff's attendance at the house of the deceased *made* but not *remembered* or *verified* by himself, or the introduction of the will of the deceased as evidence in the case.

The judgment should be reversed and a new trial granted.
All concur.

Judgment reversed.

WILLIAM R. McLAUGHLIN et al., as Executors, etc., Appellants,
v. IRA O. MILLER, Respondent.

The legislative power is ample to provide for a municipal improvement, and for that purpose to designate the district deemed benefited by it within the municipality, charge the expense of it upon the property in such district and direct assessments to be made therefor.

Where, however, the duty of distribution of such expense by assessment upon the several properties within the designated district is by the statute devolved upon any board or officer, some provision for notice to the property owners is essential; as without an opportunity to be

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heard they would be deprived of their property without due process of law.

In an action for breach of a covenant against incumbrances in a deed of certain premises in the city of Brooklyn, executed by defendant to McL., plaintiff's testator, in 1872, it appeared that prior to the execution of the deed the street in front of said premises had been improved pursuant to several acts of the legislature (Chap. 335, Laws of 1860; chap. 299, Laws of 1861; chap. 748, Laws of 1865; chap. 885, Laws of 1867; chap. 759, Laws of 1869; chap. 808, Laws of 1870), which provided among other things that, after the completion of the improvement, \$150,000 of its cost should be "assessed equally upon the lands fronting upon said" street, and that such assessment, "unless previously paid," should, with interest thereon, be included in the annual taxes to be levied upon such lands, and one-twentieth part of such assessment be levied and collected annually for twenty successive years, beginning with the year after the completion of the improvement. No provision was made for notice to the lot owners; nor was a method prescribed of ascertaining the amounts chargeable upon the different parcels of land. The improvement was completed in 1870. In the assessment-roll for that year the sum of \$550.12 was designated as the portion chargeable to the lots in question and the installment for that year was included with other taxes; this was paid by defendant, also the similar installment for 1871. It did not appear that any notice or opportunity to be heard was given to the property owners or that an assessment of the amount was in fact made by the city board of assessors. Plaintiffs claimed to recover the subsequent installments paid by McL. *Held*, that the burden was upon plaintiffs to prove that the assessment had been made and had become a charge or incumbrance on the property at the time of the conveyance; that as the determination of the amount to be assessed upon each lot was left by the legislature to others, the owners had a right to be heard; and, therefore, that the amount chargeable upon the lots in question was not legally ascertained and determined at the time of the delivery of the deed, so as to make it a charge or incumbrance within the meaning of the covenant and, so, that the action was not maintainable.

Also *held*, the fact that defendant paid the installments which fell due prior to the conveyance, did not by way of adoption or approval of the assessment, conclude him from claiming that it was not then a charge or incumbrance on the premises.

Hagar v. Reclamation District (111 U. S. 701), distinguished.

Reported below (58 Hun, 430).

(Argued March 2, 1891; decided April 7, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order

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made July 31, 1890, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

The nature of the action, and the facts, so far as material, are stated in the opinion.

Tunis G. Bergen for appellants. The total amount of the assessment charged against the lots was fixed, ascertained and determined, and inserted in the rolls for the year 1870, and so became a charge upon the lands under the covenants in the deed delivered in 1872. (*Depeyster v. Murphy*, 66 N. Y. 622; *Dowdney v. Mayor, etc.*, 54 id. 186; *Lathers v. Keogh*, 109 id. 583, 590; *Harper v. Dowdney*, 113 id. 644; Laws of 1861, chap. 299, § 6; Laws of 1869, chap. 759, § 2; Laws of 1870, chap. 608, § 2.) Defendant is estopped in this action by his vendee from seeking to avoid this assessment. (*Tingue v. Village of Portchester*, 101 N. Y. 300; *Storrs v. Barker*, 6 Johns. Ch. 166; *Mayor, etc., v. Scott*, 1 Penn. St. 309; *Raw v. Potts*, 2 Prec. in Chan. 35; *Hobbs v. Morton*, 1 Vern. 136; Story's Eq. Juris. §§ 388, 799, 1237; *Depeyster v. Murphy*, 66 N. Y. 622.) If defendant should be allowed (which is denied) to attack any of the proceedings, to show they were defective, or to go behind the returns and produce evidence *aliunde*, the affirmative of the issue is upon him. (*Heineman v. Heard*, 62 N. Y. 455; *Tingue v. Village of Portchester*, 101 id. 299; *Bank of U. S. v. Bandridge*, 12 Wheat. 64; *Mandeville v. Reynolds*, 68 N. Y. 534; *In re Roberts*, 81 id. 68; *Bradley v. Ward*, 58 id. 409.) The statutes in question fix the district of assessment, the amount to be raised, outside of city bonds, as \$325,000, and without reference to any apportionment as of value, etc. These things cannot be reviewed by courts upon grounds that the legislature acted unjustly. (*Spencer v. Merchant*, 100 N. Y. 587; *Hartshorn v. Cleveland*, 19 Atl. 974.) The defendant has raised the point that the statutes in question were unconstitutional, in that they do not provide for a notice to the property owners, and cites the well-known case of *Stuart v. Palmer* (74 N. Y. 183). It is respectfully submitted that

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the case at bar is not governed by that decision. (111 U. S. 701; 56 N. Y. 261; *Davidson v. New Orleans*, 96 U. S. 619; *People v. City of Brooklyn*, 4 N. Y. 419; *Harrisburg v. McCormick*, 129 Penn. St. 213; 84 N. Y. 619; *O'Reilly v. Kingston*, 114 id. 448.)

Alfred E. Mudge for respondent. The acts in question did not contemplate the laying of an assessment which should be a lien in its entirety from the beginning. (Laws of 1861, chap. 229, § 6; *Barlow v. S. N. N. Bank*, 63 N. Y. 399; *Lathers v. Keogh*, 39 Hun, 576.) No valid assessment was laid for the cost of the improvement before the delivery of the deed to the plaintiff's testator. (Laws of 1870, chap. 608, § 2; *Stuart v. Palmer*, 74 N. Y. 183; Laws of 1854, chap. 884, §§ 21-26.) But the acts providing for the assessment are unconstitutional and void, in that they do not provide for a notice to the property owners, giving them an opportunity to be heard. (*Stuart v. Palmer*, 74 N. Y. 183; *Remsen v. Wheeler*, 105 id. 573; *Weimer v. Brueinbury*, 30 Mich. 201; *Spencer v. Merchant*, 100 N. Y. 585.) No portion of the \$150,000 to be assessed on the property conveyed by the defendant had been ascertained prior to the delivery of his deed. There was, therefore, no charge upon the land. (*Dowd-ney v. Mayor, etc.*, 54 N. Y. 186.)

BRADLEY, J. In July, 1872, the defendant by deed, conveying to the plaintiffs' testator four lots fronting on Fourth avenue in the city of Brooklyn, covenanted that they were free from all "charges, estates, judgments, taxes, assessments and encumbrances," except a mortgage therein mentioned. This action was founded upon the alleged breach that at the time of the delivery of the deed, the premises were incumbered by an assessment before then made upon them for a portion of the expense of widening and improving that avenue; and that to relieve the property from such charge the plaintiff was required to and did pay upwards of seven hundred dollars. The improvement was made pursuant to several acts of the

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legislature, and was completed in the summer of 1870, about two years prior to the conveyance.

By the statute upon the subject, it was provided that after the completion of the improvement the sum of one hundred and fifty thousand dollars of its cost should be "assessed equally upon the lands fronting upon said avenue when so widened," except so far as any of them were by the contract exempted from assessment; and that such assessment, "unless previously paid," should with interest thereon be included in the annual taxes to be levied upon such lands, and one-twentieth part of such assessments be levied and collected annually for twenty successive years, beginning with the year after the completion of the improvement. (Laws 1861, ch. 299, § 6.) The controversy between the parties has relation only to the portion of the sum before mentioned chargeable to the lots in question. The further sums of \$150,000 provided for by L. 1869, ch. 759, § 2, and \$25,000 by L. 1870, ch. 608, § 2, were to be assessed immediately on completion of the work. The defendant paid the taxes on those four lots for 1870 and the amounts included in the general taxes in the rolls for the Fourth avenue improvement down to the time of the delivery of the deed to the plaintiffs' testator, and the latter paid the amounts included in the subsequent tax-rolls for that improvement and interest. The sum designated in the assessment-roll for the Eighth ward, in which was situated these lots, as the portion of the sum first mentioned chargeable upon them was \$550.12. The question now presented is whether the amount of it remaining at that time unpaid, was a lien or encumbrance upon the lots at the time the deed was delivered. After the completion of the work, proceedings may have been taken to apportion the \$150,000 upon lands fronting on the avenue with a view to the levy of the installments for the next year and each of the twenty years unless sooner paid. For that purpose it would be necessary in the outset to ascertain and fix the amount of that sum chargeable upon those lots. The method of doing this was not prescribed by the statute before referred to other than it was to be assessed equally upon the lands fronting on

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the avenue. Nor were the officers by whom it was to be done designated in the legislation upon the subject until the act of 1870 providing for the additional \$25,000. There it was provided that upon the passage of that act the board of assessors of the city should immediately proceed to assess such sum of \$25,000 equally upon the lands fronting on the avenue, together with the amounts theretofore "authorized to be assessed upon said lands, except so far as any of said lands are exempted from assessment." This statute may be construed as authorizing and directing the assessment of the entire sum of \$325,000 upon the lands fronting on the avenue, as soon as practicable after completion of the work, although only one-twentieth of the \$150,000 was to be levied and collected in any one year, until the full amount of it was collected or paid. The assessment for the purpose of a levy would necessarily constitute an apportionment; and when legitimately made and the sum chargeable upon those four lots legally ascertained and determined, such amount would seem to have been a charge and encumbrance upon them within the meaning of the covenant in the deed. (*Harper v. Dowdney*, 113 N. Y. 644; *Lathers v. Keogh*, 109 id. 583; *DePeyster v. Murphy*, 66 id. 622; *Dowdney v. Mayor, etc.*, 54 id. 186.)

The contention on the part of the plaintiffs that the total amount of the charge upon these lots for the improvement was ascertained and fixed prior to the delivery of the deed, is founded upon the fact that a sum as such was inserted in the assessment-rolls for 1870 and 1871, confirmed by the board of supervisors and, with their warrant annexed, delivered to the city tax collector. The assessment-roll of 1870 for the Eighth ward as sent by the city board of assessors to the board of supervisors of Kings county, contained the numbers of these four lots and opposite them respectively under heading "Fourth Avenue Improvement" sums aggregating \$550.12, and when it, with the warrant, came to the collector there appeared in another column headed "General Tax" the annual installments of such sums with other taxes; and the same may be said of the roll of 1871. In the resolution of the board of supervisors no refer-

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ence was made to that improvement, but in the warrant the collector was directed to collect a specified amount exceeding \$108,000 on account of assessment for Fourth avenue improvement and a sum mentioned as interest on balance of the assessment. This probably included a portion of the additional sum of \$175,000 provided as before mentioned for the work. At the time the assessment-roll was confirmed by the board of supervisors it was completed and in the condition it was when it went to the collector. This is substantially all that appears as to the manner the apportionment of the cost of the improvement was made, except that it did appear and was found by the court that the amounts inserted against the lots in question as the portion chargeable to them respectively, was arrived at by dividing the entire amount of the \$150,000 by the number of feet and inches of property fronting on the avenue. And it was further found that there was no evidence that any notice, or opportunity to be heard, was given to the property owners affected, in reference to any assessment for the Fourth avenue improvement. If notice was necessary to render the apportionment effectual, it could only have been given pursuant to the provisions in that respect of the city charter relating to assessments (L. 1854, ch. 384, tit. 4, § 24), as nothing is contained in the special acts providing for the improvement on the subject of notice. It is, however, said that no judicial or discretionary act was to be performed by the officers in making the assessment, and, therefore, no notice to the property owners was necessary. And in support of that view it is claimed that the construction of the language of the statute that the cost of the improvement should be "assessed equally upon the lands fronting upon the avenue," is such as to confer only the mechanical or clerical duty of dividing the entire amount of the assessment by the number of feet and inches fronting on the avenue, and thus obtaining a unit per foot or inch, and in that manner the means of ascertaining the sum chargeable upon any given lot. The legislative power is ample to provide for a public improvement, and for that purpose to designate the district deemed benefited by it within the municipality

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where it is to be made and charge the expense of it upon the property in such district, and direct assessments to be made for it there. (*In re Van Antwerp*, 56 N. Y. 261; *Spencer v. Merchant*, 100 id. 585.)

But when the duty of distribution of such expense of the work by assessment on the several properties within the designated district so charged with the burden is by the legislature devolved upon any board or officer, some provision for notice to the property owners is essential to the validity of the assessment, as without the opportunity to be heard they are denied the benefit of the constitutional guaranty that they shall not be deprived of property without "due process of law." This term, in its application for the protection of private property as well as personal rights, is significant and quite comprehensive. (*Stuart v. Palmer*, 74 N. Y. 183; *Remsen v. Wheeler*, 105 id. 573.)

The statute in the present case directed that the sum there mentioned be assessed *equally* upon the lands fronting on the avenue, which extended into or through several wards of the city. The result of the performance of this duty would be an apportionment and the determination of the equality of the assessment upon the several parcels of land within the prescribed limits. And it cannot be held that the land owners affected by it, could lawfully be denied the opportunity to be heard at some stage of the proceeding of making or perfecting the assessment. Nor is the question now one of the correctness of the manner of making the assessment or of its equality as made. Nor is the inquiry important whether or not it would have resulted any differently if notice had been given to the land owners. The determination of the amount to be assessed upon each lot was left by the legislature to others, and the land owner had the right to be heard and to challenge the manner of executing the statute in making the assessment, and to see that it was correctly accomplished. This it seems he had no opportunity furnished by any notice provided by statute to do.

In the cited case of *Hagar v. Reclamation District* (111 U. S. 701), there was notice by legal proceedings, as the assess-

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ment could only be enforced by such proceedings. But Mr. Justice FIELD in that case referred to cases where no notice is necessary, and they are those specifically charged by law, such as the tax on animals of a fixed sum per head, or on articles of a fixed sum per yard or bushel or gallon, and to taxes in form of licenses to do business of a particular kind or at a particular place.

In the case at bar the legislature did not apportion the assessment or designate the amount which should be charged upon any lot or per foot of the lands on the avenue, but declared that the result of the apportionment should be such as to produce equality of the burden of it upon all such lands. This called for a determination in some sense judicial as to the method which would effectuate that provision of the statute. Upon this subject, as well as that of the correctness of the execution of the statute in relation to making the assessment, the land owners could not lawfully be denied the opportunity to be heard. And in view of the facts as found by the trial court the amount of the assessment upon the four lots in question was not legally ascertained and determined at the time of the delivery of the deed to the plaintiffs' testator.

As before mentioned, the duty of making the assessment was, by the act of 1870, devolved upon the city board of assessors. The court did not find that it was so done, but on the contrary found a state of facts to the effect that there was no evidence that such board made such assessment; and the record before us supports that conclusion. The burden was with the plaintiffs to prove that the assessment had been made and became a charge or incumbrance on the lots at the time of the conveyance.

When it appears that an official act has been done, the regularity of its performance may be presumed, but the presumption of performance of official duty or act which is a jurisdictional prerequisite to further action does not generally arise without the aid of some statute. There is no report or certificate of the board of assessors that they had made the assessment. And the trial court found that there was no evi-

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dence produced, other than that contained in its findings, of any assessment or attempt to lay it for the improvement. It is, therefore, difficult in any view to see how the assessment can be treated as having been legitimately or effectually apportioned or made. While it apparently may seem equitable that the defendant should have paid the amount of it, because the work was completed and its benefits realized prior to the conveyance, the plaintiffs' remedy rests wholly upon the covenants in the deed, and recovery was dependent upon breach existing at the time of its delivery and acceptance.

The fact that the defendant paid the installments prior to the conveyance did not, by way of adoption or approval of the assessment, conclude him in his defense to the effect that it was not then a charge or incumbrance upon the premises.

If these views are correct the judgment should be affirmed
All concur.

Judgment affirmed.

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141 572

JAMES WALTER CHRYSTAL, an Infant by Guardian, etc.,
Respondent, v. THE TROY AND BOSTON RAILROAD COMPANY,
Appellant.

To charge a railroad corporation in an action for negligence, it is not sufficient to prove a negligent act on its part; it must be made to appear that the injury complained of was sustained by reason of such act.

Plaintiff, an infant about seventeen months old, escaped from his mother's house near a railroad crossing by crawling under a gate which was fastened, went upon the track, was struck by a train and injured. In an action to recover damages for the injury, it appeared that the bell on the locomotive was not rung or the whistle sounded eighty rods from the crossing as required by the statute. There was no evidence authorizing a finding that had the statute relating to signals at railroad crossings been complied with, the mother's attention would have been called in time to have enabled her to rescue the child, or that the injury might otherwise have been prevented. *Held*, that the testimony did not authorize a recovery.

Reported on former appeal, 105 N. Y. 164.

Chrystal v. T. & B. R. R. Co. (52 Hun, 55), reversed.

(Argued March 10, 1891; decided April 7, 1891.)

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APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made March 16, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

This was an action to recover damages for injuries to plaintiff, alleged to have been caused by the negligence of defendant.

The facts, so far as material, are stated in the opinion.

John H. Peck for appellant. The statement of the mother is so wholly incredible in its nature as not to be sufficient in law to be submitted to a jury. (*Chrystal v. T. & B. R. R. Co.*, 105 N. Y. 164, 171; *Hartfield v. Roper*, 21 Wend. 615.) The omission of a signal bell or whistle as required by statute was not the reason for the damage sustained. (3 R. S. 643, § 7; Laws of 1886, chap. 593, § 1; *Johnson v. H. R. R. Co.*, 20 N. Y. 66-73; *Cosgrove v. N. Y. C. R. R. Co.*, 13 Hun, 329; *Barringer v. N. Y. C. R. R. Co.*, 18 id. 398; *Sutton v. N. Y. C. R. R. Co.*, 66 id. 243; *Van Raden v. N. Y., N. H. & H. R. R. Co.*, 56 id. 96; *Read v. Nichols*, 118 N. Y. 224; *Ryan v. N. Y. C. & H. R. R. Co.*, 35 id. 210; *Harty v. N. J. C. R. Co.*, 43 id. 468.) The plaintiff must establish the fact and not merely afford ground for conjecture as to the reason for the damage. (*Searles v. M. R. Co.*, 101 N. Y. 661; *Malone v. B. & A. R. R. Co.*, 51 Hun, 532; *Ring v. City of Cohoes*, 77 N. Y. 90; *McCaffrey v. T. T. S. R. Co.*, 47 Hun, 404.) The defendant's counsel requested the court to charge that all the engineer was bound to do after the discovery of the danger was to use reasonable diligence to avoid it. The court refused to so charge the jury, but left it to them as a question of fact. This was error. (105 N. Y. 164.)

R. A. Parmenter for respondent. On the present appeal to this court, the former judgment as to the freedom from negligence of the mother of the plaintiff is *res adjudicata*. As

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to that question no new evidence was offered by the defendant on the last trial. (*Rice v. King*, 7 Johns. 20; *Haskin v. Mayor, etc.*, 11 Hun, 436; *McWilliams v. Morrill*, 23 id. 162; *Smith v. Smith*, 79 N. Y. 634; *Perry v. Dickerson*, 85 id. 345; *Millard v. M., K. & T. R. R. Co.*, 86 id. 441; *Palmer v. Hussey*, 87 N. B. 303; 3 Abb. N. Y. Dig. 452; *Brown v. Mayor, etc.*, 66 N. Y. 390; *Newton v. Hook*, 48 id. 676; *Gales v. Preston*, 41 id. 113; *Lahr v. M. E. R. Co.*, 104 id. 287.) Upon the evidence produced on the last trial, the question touching the negligence of the defendant and its employes in charge of the train was plainly one of fact for the jury. (*Dyer v. E. R. R. Co.*, 71 N. Y. 228; *Voak v. N. C. R. R. Co.*, 75 id. 320; *Casey v. N. Y. C. & H. R. R. Co.*, 78 id. 518, 524; *Greany v. L. S. R. R. Co.*, 101 id. 419; *Sherry v. N. Y. C. & H. R. R. Co.*, 104 id. 852; *Thompson v. N. Y. C. & H. R. R. Co.*, 110 id. 637; *Jones v. U. & B. R. R. Co.*, 36 Hun, 119.) The court will take judicial notice that a child only seventeen months old, who has been able to walk for about two months, is *non sui juris*. Therefore, negligence will not be predicated upon his own conduct. (*Pendergast v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 652; *Casey v. N. Y. C. & H. R. R. Co.*, 6 Abb. [N. C.] 104; *Ihl v. F. S. & G. S. F. R. Co.*, 47 N. Y. 317.) The negligence of the parent, whether or not imputable to a child *non sui juris*, is ordinarily a question of fact for the jury. (*Magnum v. B. C. R. R. Co.*, 36 Barb. 237, 239, 241; 38 N. Y. 455, 457, 459, 461; *Fullon v. C. P. F. & E. R. R. Co.*, 64 id. 17; *McGarry v. Loomis*, 63 id. 107; *Smedis v. B. & R. R. Co.*, 88 id. 13; *Kellogg v. N. Y. C. & H. R. R. Co.*, 79 id. 73; *Stackus v. N. Y. C. & H. R. R. Co.*, Id. 467; *Shaw v. Jewett*, Id. 616; *Massoth v. D. & H. C. Co.*, 64 id. 529; *Archer v. N. Y. C. & H. R. R. Co.*, 106 id. 601.) The defendant's motion for a nonsuit at the close of the plaintiff's evidence and renewed upon the whole testimony was properly denied. (*Flack v. Vil. of Green Island*, 23 Wkly. Dig. 534; *City of Cohoes v. Morrison*, 42 Hun, 219, 220.) The exception to the charge as requested by the plaintiff's counsel, as to the statutory sig-

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nals and the omission to observe them, was not well taken. (*Barker v. Savage*, 45 N. Y. 194; *Murphy v. Orr*, 96 id. 17.) The defendant's motion to set aside the verdict and for a new trial on the ground that the damages awarded are excessive, was properly denied. (*Kiff v. Youmans*, 20 Hun, 123; *Sloan v. N. Y. C. & H. R. R. Co.*, 1 id. 540; *Cragin v. B. C. R. R. Co.*, 18 id. 368; *Minick v. City of Troy*, 19 id. 253.)

PARKER, J. On the 4th day of September, 1877, the plaintiff, then seventeen months old, while unattended on defendant's track at the Cary avenue crossing in Hoosick Falls, was so injured by a passing locomotive as to require the amputation of a leg, and a finger of the left hand.

On a former review (105 N. Y. 164) it was determined :

1. That this court could not interfere with the finding of the jury that the plaintiff's mother was free from negligence contributing to the injury.

2. That the evidence did not authorize the jury to find that the engineer omitted to use reasonable care and diligence to avert the accident.

It appearing that as soon as he saw the child upon the crossing, he gave the signal for the brakes to be applied, and reversed his engine, doing everything that could be done to arrest the speed of the train, which he succeeded in stopping after the two small wheels of the engine had passed over the plaintiff's leg, and the judgment was reversed because there was no evidence of negligence on the part of the defendant.

The record before us contains all the evidence then under review, and in addition some testimony tending to show that the bell on the locomotive was not rung or the whistle sounded eighty rods from the crossing. The questions presented by the record are, therefore, *res adjudicata*, except in so far as the evidence relating to the failure to sound the whistle or ring the bell as commanded by statute may present others. The jury have found the fact to be that the defendant did not announce that the train was approaching the crossing by making such a signal as the statute requires. The General Term

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have approved their finding. As it has support in evidence it is now controlling. But proof of defendant's negligent act could not alone charge it with liability. It was one step in that direction, but there remained another which required that it be made to appear that the injury was sustained "by reason of such neglect." And the question is presented whether there was any evidence on which to found such a finding. A finding in effect that the boy would not have been harmed had the defendant given the proper signals. If it had they would not have served as a warning to the plaintiff, then a nursing baby learning to walk, who tottered along clapping his hands as the engine moved towards him, for he would not have understood them. But it is said that he was entitled to have this bell rung so that his mother, whose duty it was to care for and protect him, would have been apprised of the approach of the train and his danger in time to have saved him from harm. While the object of the statute was to afford the best protection possible to travelers on the public highway compelled in the progress of their journey to cross railroads at grade its provisions are sufficiently comprehensive to include a case like this, if it be true that, had the signals been given, the accident would not have happened. Such a case may readily be supposed. If it should appear that while a mother was within a short distance of a railroad crossing, but detained briefly by a passing acquaintance, her child was injured by a locomotive from which no signal was given as it approached the crossing; and further that she was conscious of the presence of her child in the vicinity, and the danger to which moving trains would expose it; was so near to it that she had time to and would have rescued it had a signal been given while the train was eighty rods from the crossing, a jury would be authorized to find that but for such neglect the injury would not have happened.

Here the facts are very different. The house in which they lived stood back from the street line about twelve feet on which was a high fence containing a gate, which according to the mother's testimony was then closed and fastened. Between

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the bottom of the gate and the ground was a space from six to eight inches in width. After nursing the infant the mother finding it was inclined to sleep laid it on the floor, and after placing a wooden chair across the outer doorway, stepped into a room opposite to arrange its cradle, and the child remaining quiet she "delayed" to arrange the room. Returning eight or ten minutes later she discovered the child was gone, and then she "leapt over the chair or took it up," and ran to the garden back of the house where potatoes and weeds were growing with stalks as high as the child, but did not see him. Then she started back to see if he had fallen into the cistern, and looked in. At that moment she heard the alarm whistle of a locomotive, and looking up, she saw a train nearer the crossing than Eldridge's, a point 452 feet distant. She ran around the house through the garden to the gate which she found closed and fastened with a string, as she had previously tied it. Looking down the avenue she saw the baby and ran to its rescue, but did not reach it in time. These facts in no wise suggest that the mother would have heard the bell had it been rung or if she did would have paid any attention to it, for had she not fastened the gate with a string which the baby could not untie, and placed a chair in the doorway to prevent his getting out? More than one hundred trains a day passed by, and hence the precaution which she described. These, with the added fact that the baby was asleep, not only seem to excuse her absence from the room, but unmistakably indicate that she did not feel any occasion to fear moving trains or heed the ringing of locomotive bells which merely indicated such passing. It does not appear that when she missed the child she would have gone directly to the railroad track had a bell been ringing, or if she had, that she would have been in time. Her fears were not in the direction of the railroad, doubtless because of the secure manner in which the gate was fastened, for had they been, with trains passing frequently and irregularly, she would have hastened to the track before exploring the garden and cistern. When her hurried search had proven unavailing, the usual

danger signal attracted her attention, but she was then too late, and whether the bell was ringing or not at that moment could not have made any difference in the result. In the analysis which we have briefly made of the testimony describing the situation and her conduct, no opportunity is presented for a finding that had a signal been given eighty rods from the crossing, the accident would have been avoided. Nor does she by testimony assert to the contrary. With reference to the omission to ring the bell, and its effect on her conduct, she testified on the direct examination: "That she heard the whistle; that it made two short toots. Q. Was there any bell rung? A. No, sir; I didn't hear any. Q. You could have heard one if there had been one? A. Yes, sir; I could have heard the bell coming." On her cross-examination she said: "I ran to the fence, and looking down the track saw the child; he was standing up before the accident. Q. You did not pay much attention to the bell? A. I could have heard it; I didn't hear it; I could hear it if it had rung. Q. Were you paying any attention to the bell, or were you looking for your child? A. I was paying attention, and, of course, I looked for my child; but when the whistle blowed I went to the train; if the bell was ringing I would have heard the bell before the whistle blew. Q. I want to know whether you paid any attention as to whether it was ringing or not. A. Why, I didn't hear the bell. Q. Did you listen for it? A. No, sir. Q. Did you pay any particular attention whether it was rung? A. No, sir; because I didn't hear the bell at all." Now, it will be observed that in only one answer does she assert that if the bell had been ringing she would have heard it before the alarm whistle sounded, which was clearly too late, as the result shows. In that answer she does not say how long before she could have heard it. She does not assert that had it rung she could have heard it in time to have saved the child from injury, or if such were the case, that in view of the situation her attention would have been attracted in the direction of the railroad rather than the garden and the cistern which she first visited. While her evidence indicates that she

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was quite positive that the bell did not ring, it fails to suggest that she even entertained the thought that if the bell had been rung, the result would have been otherwise. It seems to be clear, therefore, that the evidence did not authorize a finding that had the statute relating to signals at railroad crossings been complied with, the mother would have rescued the child from danger. No other way is suggested in which the ringing could have been made available for the protection of the plaintiff.

It follows that the damages sustained were not occasioned by reason of the defendant's omission to give a signal eighty rods from the crossing. The exception to the ruling of the court on the motion for a nonsuit was well taken.

The judgment should be reversed.

All concur, except BRADLEY, J., not voting.

Judgment reversed.

In the Matter of the Judicial Accounting of HANNAH
MCGOWAN, as Executrix, etc., of JOHN F. WALLACE,
Deceased, WILLIAM CARROLL, Appellant.

The provisions of the Revised Statutes (2 R. S. 90, § 43) directing that "no legacies shall be paid until after the expiration of one year from the time of granting letters testamentary or of administration unless the same are directed by the will to be sooner paid," changed the time when legacies commence to draw interest from one year after the death of the testator to one year after the granting of letters.

The words "letters testamentary" or "of administration" include temporary letters, and so, where such letters have been granted, pending proceedings for the probate of a will, interest upon a legacy begins to run one year after the date of the issue of such letters.

Curr v. Bennett (3 Dem. 459); *Dustan v. Carter* (Id. 149); *Clark v. Butler* (4 id. 378); *In re Gibson* (24 Abb. [N. C.] 45), overruled.

(Argued March 2, 1891; decided April 7, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 6, 1890, which reversed a decree of the Surrogate's

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127	408
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Court upon a settlement of the accounts of the executrix of the will of John F. Wallace, deceased, so far as it related to the allowance of interest upon a legacy given to William Carroll.

John F. Wallace died July 23, 1885, leaving a last will and testament. Objections to the probate of the will were filed, and thereafter, on March 3, 1886, letters of temporary administration were granted upon the estate of said deceased. The will was admitted to probate on the 29th day of June, 1887, and on that day letters testamentary were issued. By the will a legacy of \$20,000 was given to Carroll. The executrix offered to pay the amount of the legacy with interest from one year after the date of issue of letters testamentary. The legatee insisted that he was entitled to interest after the expiration of one year from the date of death of testator. He finally received from the executrix the amount of the legacy less the collateral inheritance tax, with interest from one year after the date of granting letters testamentary under a stipulation which provided that: "The above check is received by me without prejudice to my claim that I am entitled to interest from one year from the death of the testator, or for any further or other period, and that I am not liable to pay the collateral inheritance tax. If the court decides in my favor on such or either of said claims, I am to receive such claims."

Malcolm Campbell for appellant. The learned surrogate was right in holding that the time from which interest should run is one year after the death of the testator. (*Williamson v. Williamson*, 6 Paige, 300, 301; *Sitwell v. Bernard*, 6 Ves. 520; *Gibson v. Bott*, 7 id. 96; *Wheeler v. Ruthven*, 74 N. Y. 428; *Lawrence v. Embree*, 3 Bradf. 364; *Carr v. Bennett*, 3 Dem. 459; *Dustan v. Carter*, Id. 149; *Clark v. Butler*, 4 id. 378; *In re Gibson*, 24 Abb. [N. C.] 45; *Campbell v. Cowdrey*, 31 How. Pr. 172.) A fair construction of the statute is that it did not work a repeal of the existing law as to interest on legacies. (*Mushlitt v. Silverman*, 50 N. Y. 360; *Cooke v. Meeker*, 36 id. 15; *Campbell v. Cowdrey*, 31 How. Pr. 180;

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Lawrence v. Embree, 3 Bradf. 365; *Carr v. Bennett*, 3 Dem. 455; *Dustan v. Carter*, Id. 150.) A contrary construction would in effect defeat the intent of the testator, which the courts are bound, as far as possible, to respect and enforce. (*Lawrence v. Embree*, 3 Bradf. 364; *Carr v. Bennett*, 3 Dem. 455.) If the statute is to be construed as contended for by one opponent, then it is unconstitutional. (*Embury v. Connor*, 3 N. Y. 311; *Powers v. Bergen*, 6 id. 358; *In re John and Cherry Streets*, 19 Wend. 659; *Wynehamer v. People*, 13 N. Y. 378.) The reason for the rule allowing one year from the issuing of letters for the payment of legacies applies with equal force to the case of temporary letters as to that of final letters testamentary. (Code Civ. Pro. §§ 2672, 2677, 2717, 2719.)

Charles H. Woodbury for respondent. General legacies bear interest from one year after the grant of letters testamentary, and not from one year after the testator's death. (2 Williams on Ex. [6th ed.] 1530, 1531; 2 Roper on Legacies, chap. 20; *Wheeler v. Ruthven*, 74 N. Y. 428, 429, 431; 2 R. S. chap. 6, art. 2, § 43; Code Civ. Pro. § 1819; *Thorn v. Garner*, 113 N. Y. 198, 202; 42 Hun, 507, 111; *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 207, 215; *Kerr v. Dougherty*, 79 id. 327; 17 Hun, 341; *Brown v. Knapp*, 79 N. Y. 136, 141; *Cooke v. Meeker*, 36 id. 15, 23; *Bradner v. Faulkner*, 12 id. 472; *Burtis v. Dodge*, 1 Barb. Ch. 77; *In re Fisk*, 19 Abb. Pr. 209.) Before the adoption of the Revised Statutes, general legacies were due and payable at the expiration of one year from testator's death, and the rule then was that interest began to run from that time upon the principle that the legacy was then due and payable. (2 Redf. on Wills [3d ed.], 466, 467; Swinburne, § 19; *Wheeler v. Hathaway*, 54 Mich. 547; *Beckford v. Tobin*, 1 Ves. Sr. 310; *Sitwell v. Barney*, 6 Ves. 520, 539; *Wood v. Penoyre*, 13 id. 333; *Pearson v. Pearson*, 1 S. & L. 10; *Lawrence v. Embree*, 3 Bradf. 364; *Campbell v. Coudrey*, 31 How. Pr. 172; *Dustan v. Carter*, 3 Dem. 150; *Carr v. Bennett*, 3 id.

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450. *Williamson v. Williamson*, 6 Paige, 298.) The change wrought in the Revised Statutes in the whole system of administration of decedents' estates is such that it would be highly unjust and inequitable to continue the old rule as to interest. (Swinburne on Wills, § 10; 1 Williams on Ex. [6th ed.] chap. 1, § 2; 2 R. S. 71, § 16.) Letters of temporary administration are not included in the term "letters testamentary." (Code Civ. Pro. §§ 2668, 2672, 2673, 2674.) If the appellant's views of the law as to the time when interest began to run, is correct, then the offer to pay the legacy with interest from the expiration of one year after the grant of letters, less the collateral inheritance tax, was an offer to pay all that the legatee was entitled to receive, and his refusal to receive that sum barred his claim for interest on that sum after the offer was refused. (*Burtis v. Dodge*, 1 Barb. Ch. 77.)

PARKER, J. Two questions are presented by this appeal:

1. Whether interest on a general pecuniary legacy begins to run one year after the testator's death or one year after the grant of letters testamentary or of administration?

2. If one year after grant of letters, does the time begin to run from the date of granting letters of temporary administration pending probate proceedings?

The statute provides that "no legacies shall be paid by any executor or administrator until after the expiration of one year from the time of granting letters testamentary or of administration, unless the same are by the will to be sooner paid." (2 R. S. marg. p. 90, ch. 6, title 3, art. 2, § 43.) Prior to such enactment interest on legacies of the character therein referred to, was payable one year after the death of the testator, the exception to the rule being founded generally on facts which the courts have deemed equivalent to a direction in the will to pay interest from the date of testator's death.

Whether the effect of the statute was to change the time when legacies commence to draw interest from one year after the death of a testator to one year after the granting of letters has not been presented to this court in such manner as to

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require its determination, so far as we have observed, in but one case. In *Kerr v. Dougherty* (17 Hun, 341) the General Term held that such was the effect of the statute and accordingly modified the judgment, which embraced interest computed from one year after the death of testator. In the opinion of this court that proposition was not discussed, but the judgment as modified was affirmed so that the question was necessarily considered and passed upon. (79 N. Y. 327.) While it is probably true as appellant insists that in no other case has this court been required to pass on the question, still the effect of the statute in that respect has been commented on so frequently as to leave no room to doubt the view of the court, though *Kerr v. Dougherty* were not controlling. (*Bradner v. Faulkner*, 12 N. Y. 472; *Cooke v. Meeker*, 36 id. 15-23; *Thorn v. Garner*, 113 id. 198-202; *Van Rensselaer v. Van Rensselaer*, Id. 207-215.) In Surrogate's Court a number of decisions may be found adhering to the former rule, notwithstanding the cases above cited. (*Carr v. Bennett*, 3 Dem. 459; *Dustan v. Carter*, Id. 149; *Clark v. Butler*, 4 id. 378; *Matter of Gibson*, 24 Abb. [N. C.] 45.) The refusal of the Surrogate's Court to accept the views of this court as expressed in the cases cited is founded on the claim that they are obiter. We shall, therefore, briefly allude to the reason which has led to the determination that the effect of the statute was to do away with the rule allowing interest on general legacies at the expiration of one year from the death of a testator. As that rule was not created by legislative enactment we must ascertain the principle which led to its adoption. Originally, it was assumed that the assent of the executor to the legacy was essential before the title of the legatee became complete, for without such assent the legatee had no authority to take possession of his legacy. The ecclesiastical court at an early period determined that a year from a testator's death the executor should render an account of the performance of the whole will (Swinburne on Wills, part 6, § 19), and consequently that was the time when the executor should assent or be presumed to assent to the pay-

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ment of legacies. The legacies then being due and payable at the end of a year, if payment was longer withheld the legatee was held to be entitled to interest thereafter, and for the same reason that interest is payable on all other demands after the principal becomes due. So a legacy made payable at a given time by the terms of a will, on the same principle is held to bear interest from the date when payment is directed to be made.

While it is true that many authorities may be found both in England and this country which declare that interest is payable on general legacies one year after the death of a testator, the basis of the decisions rests in the fact that at such time the principal becomes payable to the legatee.

So when the legislature declared by statute that no legacy shall be paid until after the expiration of one year from the time of granting letters unless the will direct otherwise, the principle upon which the former rule was founded required the courts of this state to hold that interest was not payable until one year after the issue of letters, for not until then was the legatee entitled to the principal. The general rule then from early times has been and still is that interest begins to run from the time when a legacy is payable. They were at one time payable a year after the death of a testator. But in this state the legislature has postponed the time of payment until one year after the grant of letters. And the application of the principle which the courts have long enforced to this changed situation produces necessarily a different result. One which the law-making power, however, must be deemed to have contemplated.

The second question, whether the words "granting letters testamentary or of administration" as used in the statute includes letters of temporary administration, we think, should be answered in the affirmative. 1. Because the legislature having used the words "letters of administration" instead of "letters of administration with the will annexed" must be deemed to have employed them in their broader meaning so as to include letters of temporary administration as well.

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2. The inducing cause for the enactment does not militate against such construction.

Prior to the passage of chap. 456 of the Laws of 1890 the persons to whom letters were granted were required to wait six months before advertising for claims, and after that time they were directed to advertise for the presentation of demands by creditors for a period of six months. Necessarily, therefore, a year would elapse before it could be definitely ascertained whether after the payment of debts and funeral expenses there would remain of the testator's estate an amount sufficient to pay legacies. Hence the statute forbidding their payment until such time.

When, as in this case, delay in the probate of a will is occasioned by a contest, letters of temporary administration may issue. (Code Civ. Pro. § 2668.) The temporary administrator has authority to take into his possession personal property; to secure and preserve it; collect choses in action; and maintain actions therefor. (Code, § 2672.) He may publish the usual notice to creditors requiring them to exhibit their demands to him, and such publication has the same effect as to him and also as to the executor or administrator subsequently appointed "as if the temporary administrator was the executor or an administrator in chief, and the person to whom the subsequent letters are issued was his successor." (§ 2673.)

After a year has elapsed the surrogate may, on the application of a temporary administrator, or on petition of a creditor in a proper case, make an order permitting the payment of the whole or any part of a debt. (§ 2674.) When the appointment of a temporary administrator is occasioned by the absence from the state of an executor named in the will, the surrogate may direct him to make payment of a legacy or other pecuniary provision under a will as though he were executor or administrator. (§ 2672.)

The statutory provisions referred to make it apparent that the temporary administrator is invested with the authority and the duty to take all the steps which an executor can take for the purpose of ascertaining the condition of the estate at the

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expiration of a year from a grant of letters. There was no occasion, therefore, for the legislature to provide that the time occupied by the temporary administrator should not be included in the year which must elapse between the issue of letters and the time when legacies are payable, and we do not think that the language employed should receive such a construction.

Letters of temporary administration were granted March 3, 1886, and, therefore, the legatee became entitled to interest from March 3, 1887. Interest was only allowed him from June 29, 1888.

The judgement of the Supreme Court and decree of the surrogate should be reversed and the proceedings remitted for rehearing by the surrogate, with costs payable out of the estate.

All concur.

Judgment reversed.

CHARLES B. LINTON, Respondent, v. THE UNEXCELLED FIRE-
WORKS COMPANY, Appellant.

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77 AD'318

The law will not assume that a servant has been derelict in duty simply from the fact that his employer has discharged him before the expiration of the term of employment, and in an action by him for a breach of the contract of employment, upon proof that he was discharged while engaged in the performance of the contract, and before his term of service had expired, the burden is cast upon the employer of proving, and hence of alleging, facts in justification of the dismissal. (Code Civ. Pro. § 500.)

A general or specific denial in an answer controverts only material allegations, or such facts as the plaintiff would be compelled to prove to establish his cause of action.

In such an action the complaint set up the contract of employment and alleged that plaintiff entered defendant's employ under it; that before its termination defendant, without right or cause, discharged him. The answer admitted the contract, denied the breach, alleged that plaintiff was discharged for cause, and separately specified twelve acts of plaintiff in alleged violation of the contract. Both parties gave evidence tending to sustain the allegations in their respective pleadings,

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and in addition thereto defendant offered to show other acts of misconduct and unfaithful service on the part of plaintiff not alleged in its answer. This was, upon objection, excluded. *Held*, no error.

(Submitted March 20, 1891; decided April 7, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 24, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

This was an action to recover damages for an alleged breach of a contract of employment.

By a written agreement between the parties dated June 8, 1887, the plaintiff agreed to faithfully, diligently and to the best of his ability, serve the defendant as superintendent of of its pyrotechnic factories from July 14, 1887, until December 31, 1889, for the sum of \$4,000 per year, payable in equal weekly payments. The plaintiff alleged in his complaint that he "entered upon said service and continued therein until on or about February 6, 1889, when the defendant broke the said contract and, without right or cause, discharged" him from its said employment, by reason whereof he sustained damages to the amount of \$3,367.

The defendant by its answer, admitted the contract, but denied that it broke the same or that it discharged the plaintiff without cause, and alleged that "the plaintiff was discharged by the defendant on or about the 6th of February, 1889, for cause and because said plaintiff broke and violated said contract, and did not fulfill the terms, conditions and obligations" thereof on his part; that he "did not faithfully and diligently serve the defendant as superintendent of its factories, and did not fill said position to the best of his ability * * * in this, to wit:" Then followed twelve specifications, separately stated, of acts alleged to have been done by the plaintiff in violation of said agreement, including disobedience of orders, conversion to his own use of defendant's property, conspiracy against its interests and the like.

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Evidence was given by the parties tending to sustain the allegations in their respective pleadings, and the jury, upon this conflict of testimony, found for the plaintiff, awarding him all that he claimed.

Further facts are stated in the opinion.

Leslie W. Russell for appellant. In this case the plaintiff was bound to prove that the breach came from the defendant. This plaintiff sues for a breach of contract, which is denied, and there is a broad distinction between the right to prove that the breach came from the plaintiff first and the different right to prove the just cause for a discharge. The two are different things, although the same proof in law be sufficient for one as well as the other. (*Schermerhorn v. Van Allen*, 18 Barb. 29; *Gleason v. Clark*, 9 Cow. 57; 7 East, 479; *Wager v. Ide*, 14 Barb. 468.) Bearing in mind that this action is substantially for unliquidated damages, it is certainly admissible, under the general issue, to give in evidence any proof which might tend to mitigate those damages. (*Britton v. McCauley*, 1 Abb. Ct. App. Dec. 282; *Thorn v. Knapp*, 42 N. Y. 474; *Kniffen v. McConnell*, 30 id. 285.)

Wm. J. Gaynor for respondent. It was incumbent on the defendant to plead the facts which it proposed to rely upon to justify the discharge. (Wood on Master & Servant, §§ 109, 118.)

VANN, J. Upon the trial of this action the plaintiff read in evidence the contract in question, which provided for his employment by the defendant until December 31, 1889, proved that he was discharged February 6, 1889, while engaged in the performance thereof, showed that after due effort he could not obtain other employment, and rested. Thereupon the defendant introduced evidence tending to support the twelve specifications of misconduct and unfaithful service on the part of the plaintiff set forth in its answer, and in addition thereto offered to show other acts of misconduct and unfaithful service on his part not alleged in the answer. Exceptions to

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the ruling of the court excluding this evidence, upon the ground that the facts had not been pleaded, present the main question arising upon this appeal. No effort was made to amend the answer, but the defendant rested, so far as the point under consideration is concerned, upon the strength of its exceptions. The defendant insists that this evidence was competent under its denial of the averment by the plaintiff that the defendant broke the contract, and, without right or cause, discharged him.

The plaintiff did not wait until the expiration of the period for which he was hired and seek to recover under the contract the wages therein agreed upon, but he commenced this action within a few days after his discharge to recover the damages caused thereby. It was necessary for him to aver and prove that he was discharged before his term of service, as provided by the contract, had expired, but it was not necessary that he should, specifically or in express terms, aver or prove that he was discharged without cause, as a discharge before the determination of the stipulated period was *prima facie* a violation of the agreement.

The law will not assume that a servant has been derelict in duty from the fact that his employer discharged him, but upon proof under proper allegations that he was discharged while engaged in the performance of the contract and before his term of service had expired, the burden is cast upon the employer of proving, and hence of alleging, facts in justification of the dismissal. Such a defense confesses the contract and the discharge, but avoids the cause of action by showing new matter which, by the command of the statute, must be pleaded. (Code Civ. Pro. § 500; Code Pro. § 149; *McKyring v. Bull*, 16 N. Y. 297.) Any other rule, as was said by this court in the case cited, would "lead to surprises upon the trial, or to an unnecessary extent of preparation." A general or a specific denial controverts only "material" allegations or such facts as the plaintiff would be compelled to prove to establish his cause of action. (*Griffin v. Long I. R. R. Co.*, 101 N. Y. 348, 354; *Fox v. Turner*, 17 N. Y. S. R. 666.) It does

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not put at issue immaterial averments, because the Code does not require that they should be denied. (§ 500.) The language of the statute is that the answer "must contain a * * * denial of each material allegation of the complaint controverted by the defendant," etc. That the plaintiff was discharged before the contract had expired was material. That he was discharged without cause was immaterial, so far as the complaint was concerned, because a recovery could be had without proving it. It was sufficient for the plaintiff to allege a violation of the contract by the defendant. His effort to anticipate and deny any possible defense to his cause of action was surplusage.

Moreover, the main object of a pleading is to notify the adverse party of the facts relied upon by the pleader to constitute a cause of action or a defense. The improvement sought to be effected by the system of pleading provided by the Code was to enable each party to know precisely what he would be required to prove upon the trial. Accordingly, no pleading should be so framed as to mislead or deceive the adverse party by furnishing him only a part of the facts relied upon. Yet this would result from the construction of the pleadings in this action contended for by the defendant, because the effect of a denial that the discharge was without cause, in connection with twelve affirmative specifications of good cause for the discharge, would naturally induce the belief that the acts or omissions so specified were all that the plaintiff would be called upon to meet. It was a fair inference that evidence as to other derelictions was not embraced by the answer and could not be received.

The defendant could not show, as it tried to, acts of gross immorality on the part of the plaintiff, without suggesting them in the answer, although many other wrongful acts of less importance were alleged with great fullness and precision. A party who has, either intentionally or otherwise, led his adversary to believe that certain enumerated acts only would be proved, will not be permitted to prove other acts of which no notice was given.

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In a case recently decided by this court, the complaint averred the performance of all the conditions precedent contained in a contract. The answer denied all allegations not thereby admitted and affirmatively alleged that the plaintiff had not performed all the conditions precedent, and enumerated certain things which, as it specifically alleged, showed that the conditions had not all been performed. The court held that, although the denial, "if left by itself, might have made an issue as to each condition precedent in the contract," still the issue was "confined to the particular breaches of condition specifically referred to." (*Reed v. Hayt*, 19 J. & S. 121, 128, affirmed on the opinion of the General Term in 109 N. Y. 659.) That case goes farther than is necessary in the decision of the case in hand, because there the averment that the conditions precedent had all been complied with was a substantive part of the complaint, whereas, here, as we have seen, the allegation that the discharge was without cause, was not essential to a recovery by the plaintiff.

We think that the new matter that the defendant sought to prove in confession and avoidance of the contract and the discharge was properly excluded by the trial court upon the ground that it had not been alleged in the answer.

We have examined the other exceptions, but find none that require comment.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed. _____

124	538
130	387
124	538
167	207

LOUISA W. HAMER, Appellant, v. FRANKLIN SIDWAY, as
Executor, etc., Respondent.

S., defendant's testator, agreed with W., his nephew, plaintiff's assignor, that if he would refrain from drinking liquor, using tobacco, swearing and playing cards or billiards for money until he should become twenty-one years of age he would pay him \$5,000. W. performed his part of the agreement; he became of age in 1875. Soon thereafter he wrote to S. advising him of such performance, stating that the sum specified was due him, and asking payment. S. replied admitting the agreement

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and the performance and stating that he had the money in bank, set apart, which he proposed to hold for W. until the latter was capable of taking care of it. It was thereupon agreed between the parties that the money should remain in the hands of S. on interest. In an action upon the agreement, *held*, that it was founded upon a good consideration and was valid and enforceable.

It is not essential in order to make out a good consideration for a promise to show that the promisor was benefited or the promisee injured; a waiver on the part of the latter of a legal right is sufficient.

S. died in 1887 without having paid any portion of the sum agreed upon. *Held*, that under the agreement made in 1875, the relation of the parties thereafter was not that of debtor and creditor, but of trustee and *cestui que trust*; and that, therefore, the claim was not barred by the Statute of Limitations.

It did not appear upon the face of the complaint that the original agreement was not in writing, and so prohibited by the Statute of Frauds, because not to be performed within a year. *Held*, that as no such defense was set up in the answer, it was not available.

Also *held*, that the statements of S., subsequent to the date of final performance on the part of the promisee, was a waiver of such defense.

Mallory v. Gillett (21 N. Y. 412); *Belknap v. Bender* (75 id. 446); *Berry v. Brown* (107 id. 659); *Baumont v. Reeve* (Shirley's L. C. 6); *Porterfield v. Butler* (47 Miss. 165); *Duvoll v. Wilson* (9 Barb. 487); *In re Wilber v. Warren* (104 N. Y. 192); *Vanderbilt v. Schreyer* (91 id. 392); *Robinson v. Jewett* (116 id. 40), distinguished.

Hamer v. Sidway (57 Hun, 229), reversed.

(Argued February 24, 1891; decided April 14, 1891.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made July 1, 1890, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granted a new trial.

This action was brought upon an alleged contract.

The plaintiff presented a claim to the executor of William E. Story, Sr., for \$5,000 and interest from the 6th day of February, 1875. She acquired it through several mesne assignments from William E. Story, 2d. The claim being rejected by the executor, this action was brought. It appears that William E. Story, Sr., was the uncle of William E. Story, 2d; that at the celebration of the golden wedding of Samuel

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Story and wife, father and mother of William E. Story, Sr., on the 20th day of March, 1869, in the presence of the family and invited guests he promised his nephew that if he would refrain from drinking, using tobacco, swearing and playing cards or billiards for money until he became twenty-one years of age he would pay him a sum of \$5,000. The nephew assented thereto and fully performed the conditions inducing the promise. When the nephew arrived at the age of twenty-one years and on the 31st day of January, 1875, he wrote to his uncle informing him that he had performed his part of the agreement and had thereby become entitled to the sum of \$5,000. The uncle received the letter and a few days later and on the sixth of February, he wrote and mailed to his nephew the following letter:

“BUFFALO, *Feb.* 6, 1875.

“W. E. STORY, Jr.:

“DEAR NEPHEW — Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have five thousand dollars as I promised you. I had the money in the bank the day you was 21 years old that I intend for you, and you shall have the money certain. Now, Willie I do not intend to interfere with this money in any way till I think you are capable of taking care of it and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. The first five thousand dollars that I got together cost me a heap of hard work. You would hardly believe me when I tell you that to obtain this I shoved a jackplane many a day, butchered three or four years, then came to this city, and after three months' perseverance I obtained a situation in a grocery store. I opened this store early, closed late, slept in the fourth story of the building in a room 30 by 40 feet and not a human being in the building but myself. All this I done to live as cheap as I could to save something. I don't want you to take up with this kind of fare. I was here in the cholera season '49 and '52

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and the deaths averaged 80 to 125 daily and plenty of small-pox. I wanted to go home, but Mr. Fisk, the gentleman I was working for, told me if I left then, after it got healthy he probably would not want me. I stayed. All the money I have saved I know just how I got it. It did not come to me in any mysterious way, and the reason I speak of this is that money got in this way stops longer with a fellow that gets it with hard knocks than it does when he finds it. Willie, you are 21 and you have many a thing to learn yet. This money you have earned much easier than I did besides acquiring good habits at the same time and you are quite welcome to the money; hope you will make good use of it. I was ten long years getting this together after I was your age. Now, hoping this will be satisfactory, I stop. One thing more. Twenty-one years ago I bought you 15 sheep. These sheep were put out to double every four years. I kept track of them the first eight years; I have not heard much about them since. Your father and grandfather promised me that they would look after them till you were of age. Have they done so? I hope they have. By this time you have between five and six hundred sheep, worth a nice little income this spring. Willie, I have said much more than I expected to; hope you can make out what I have written. To-day is the seventeenth day that I have not been out of my room, and have had the doctor as many days. Am a little better to-day; think I will get out next week. You need not mention to father, as he always worries about small matters.

Truly Yours,

“W. E. STORY.

“P. S.—You can consider this money on interest.”

The nephew received the letter and thereafter consented that the money should remain with his uncle in accordance with the terms and conditions of the letters. The uncle died on the 29th day of January, 1887, without having paid over to his nephew any portion of the said \$5,000 and interest.

H. J. Swift for appellant. The letter coupled with the assent of the nephew that the money should remain in the

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uncle's hands on interest, made defendant's testator a depositary or a trustee of an established trust. If there was a sufficient consideration for the original contract between plaintiff's assignor and defendant's testator, then the promises in the letter were in settlement of a legal obligation, are founded upon sufficient consideration and are binding. (1 Pars. on Cont. [6th ed.] 443, 447; *Freeman v. Freeman*, 43 N. Y. 34; *Haden v. Buddensick*, 4 Hun, 649; *Miller v. Drake*, 1 Caines, 45; Chitty on Cont. [6th ed.] 52; *Crosbie v. Ponsonby*, 73 El. & Bl. 872; *Nixon v. Porter*, 1 Hilt. 318; *Johnson v. Titus*, 2 Hill, 606; *Bentley v. Morse*, 14 Johns. 468-478; *Scouton v. Eislord*, 7 id. 36; *Cameron v. Fowler*, 5 Hill, 306; *Goulding v. Davidson*, 26 N. Y. 604; *Sternberg v. Provoost*, 13 Barb. 365; *Proseus v. McIntyre*, 5 id. 424; *Comstock v. Smith*, 7 Johns. 86; *Early v. Mahon*, 19 id. 147; *Hamilton v. Gridley*, 54 Barb. 542; *Jones v. Hay*, 52 id. 501; 1 Addison on Cont. 2; 2 Kent's Comm. 465; *Haigh v. Brooks*, 4 P. & D. 288; *Smith v. Smith*, 13 C. B. [N. S.] 429; *Westlake v. Adams*, 5 C. B. 247; *Wilkinson v. Oliver*, 1 Scott, 461; *Farmer v. Stewart*, 2 N. H. 97; *Harlan v. Harlan*, 20 Penn. St. 303; *Perry v. Blackman*, 33 Vt. 7.) The letter interpreted by surrounding circumstances established a trust and made the uncle self-appointed trustee of the \$5,000. (*Gray v. Barton*, 55 N. Y. 68; *Day v. Roth*, 18 id. 448; *Fulton v. Fulton*, 48 Barb. 581; *Taylor v. Kelley*, 5 Hun, 115; *White v. Hoyt*, 73 N. Y. 505; *In re Collyer*, 4 Dem. 25-28; *Martin v. Funk*, 75 N. Y. 134; *Mabie v. Bailey*, 95 id. 206.) If the uncle did not constitute himself a trustee by the letter he certainly made himself a depositary of the money which belonged to the nephew, and if this is so the plaintiff is just as much entitled to recover as though the uncle had made himself a trustee, for the only bearing which the trusteeship has upon the question is as to whether the Statute of Limitations applies or not. (*Payne v. Gardiner*, 29 N. Y. 146, 152, 153, 172; *In re Waldron*, 28 Hun, 481; *Bank of B. N. A. v. M. N. Bank*, 91 N. Y. 106; *Sweet v. Irish*, 36 Barb. 467; *Merritt v. Todd*, 23 N. Y. 28; *Bough-*

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ton v. Flint, 74 id. 476; *Howell v. Adams*, 68 id. 314; *Munger v. A. C. N. Bank*, 85 id. 580; *Smiley v. Fay*, 100 id. 262.) The claim that inasmuch as the assignment from the nephew to his wife is declared void under the Bankrupt Act, therefore the plaintiff cannot maintain this action, is unsound. (*Hatch v. Brewster*, 53 Barb. 276; *More v. M. Bank*, 55 N. Y. 41; *Pell v. Treadwell*, 5 Wend. 661; *Alvord v. Latham*, 31 Barb. 294; *Hone v. Henriquez*, 13 Wend. 240.)

Adelbert Moot for respondent. The court should have decided with the defendant upon the facts. (*Finch v. Parker*, 49 N. Y. 1, 8; Code Civ. Pro. § 1317; *Smith v. Ins. Co.*, 5 Lans. 552; *Parsons v. Brown*, 5 Hun, 112; *Greenleaf v. People*, 13 id. 246; *Wheeler v. Macy*, 30 N. Y. 231; *Godfroy v. Mosher*, 66 id. 251; *Moran v. McLarty*, 75 id. 25.) There is no consideration to support the promise to pay the nephew \$5,000. If the nephew was required to do something that would injure him, or something that would benefit the uncle, and did so with the assent of his father, then there would be a consideration for the payment of the \$5,000. Simply failing to play cards or billiards for money, or drink liquor, or use tobacco, would not benefit the uncle; would not, and did not, injure the nephew. (Laws of 1889, chap. 170; *Nash v. Russell*, 5 Barb. 556; *Porterfield v. Butler*, 47 Miss. 165; *Duvoll v. Wilson*, 9 Barb. 487; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Whitaker v. Whitaker*, 52 id. 368; *Coleman v. Burr*, 25 Hun, 239; 93 N. Y. 17; *Wilbur v. Warren*, 104 id. 192; *Malory v. Gillett*, 21 id. 412; *Belnapp v. Bender*, 75 id. 446; *Berry v. Brown*, 107 id. 659; *Oddy v. James*, 48 id. 675; Pollock on Cont. 674; *White v. Bluett*, 53 L. J. Ex. 36; *Storm v. U. S.*, 94 U. S. 768; *Crosby v. McDoual*, 13 Ves. 147.) Neither William E. Story, Sr., nor any other person, ever held this \$5,000 in trust for William E. Story, Jr., therefore, plaintiff cannot recover this action. (Code Civ. Pro. § 382; *Miller v. Wood*, 116 N. Y. 354; *Harris v. Clark*, 3 id. 93; *Steere v. Steere*, 5 Johns. Ch. 1; *Martin v. Funk*, 75

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N. Y. 134.) William E. Story did not hold these moneys in trust for William E. Story, 2d, and there was no consideration flowing to him from William E. Story, 2d, to support a trust. (*Martin v. Funk*, 75 N. Y. 134; *Young v. Young*, 80 id. 420; *Brumm v. Schuett*, 59 Wis. 261; *Hone v. DePeyster*, 103 N. Y. 662; *In re Crawford*, 113 id. 560; *Beaver v. Beaver*, 117 N. Y. 421; *Vanderbilt v. Schreyer*, 91 id. 392; *Wilbur v. Warren*, 104 id. 192; *Presb. Ch. v. Cooper*, 112 id. 517; *Robinson v. Jewett*, 116 id. 40-53; *Embrey v. Jemison*, 131 U. S. 336; *Smith v. Heightower*, 76 Ga. 629; *Shuder v. Newby*, 85 Tenn. 348; *Head v. Baldwin*, 83 Ala. 122; *Langdell on Cont.* §§ 71-79; *Hare on Cont.* §§ 262-271; *Kent v. Rand*, 64 N. H. 45; *Wennall v. Adney*, 3 B. & P. 247; *Eastwood v. Kenyon*, 11 A. & E. 438; *Mendenhall v. Klinck*, 51 N. Y. 246; *Blackwell v. Wisewall*, 14 How. Pr. 257-260; *Hayes v. Willio*, 4 Daly, 259; *Bliss v. Lawrence*, 58 N. Y. 442; *Andrew v. N. Y. B. Society*, 4 Sandf. 156; *Eadie v. Slimmon*, 26 N. Y. 9; *Barry v. E. L. Ins. Co.*, 58 id. 587; *Zabriskie v. Smith*, 13 id. 322-332; *Lacy v. Getman*, 119 id. 109.) As plaintiff's claim rests upon contract, it is barred by the Statute of Limitations. (*Lammle v. Stoddard*, 103 N. Y. 672; *Roberts v. Ely*, 113 id. 128; *In re Neilley*, 95 id. 399; *Mills v. Davis*, 113 id. 243; *Mills v. Mills*, 115 id. 80-86; *Wood v. Bd. Suprs.*, 50 Hun, 1; *Strough v. Bd. Suprs.*, Id. 54; 119 N. Y. 212; *Smiley v. Fry*, 100 id. 262; *Kane v. Bloodgood*, 7 Johns. Ch. 89; *Murray v. Coster*, 20 Johns. 576; *McCurdy v. Pierson*, 33 Hun, 520; *Butler v. Johnson*, 111 N. Y. 204; *Hovey v. Elliott*, 118 id. 124.)

PARKER, J. The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator William E. Story became indebted to his nephew William E. Story, 2d, on his twenty-first birthday in the sum of five thousand dollars. The trial court found as a fact that "on the 20th day of March, 1869,
* * * William E. Story agreed to and with William E.

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Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of \$5,000 for such refraining, to which the said William E. Story, 2d, agreed," and that he "in all things fully performed his part of said agreement."

The defendant contends that the contract was without consideration to support it, and, therefore, invalid. He asserts that the promisee by refraining from the use of liquor and tobacco was not harmed but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the promisor was benefited, the contract was without consideration. A contention, which if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was, in fact, of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The Exchequer Chamber, in 1875, defined consideration as follows: "A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him." (Anson's Prin. of Con. 63.)

"In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." (Parsons on Contracts, 444.)

"Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise." (Kent, vol. 2, 465, 12th ed.)

Pollock, in his work on contracts, page 166, after citing the definition given by the Exchequer Chamber already quoted,

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says: "The second branch of this judicial description is really the most important one. Consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first."

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him \$5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it, but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been support the position we have taken.

In *Shadwell v. Shadwell* (9 C. B. [N. S.] 159), an uncle wrote to his nephew as follows:

"MY DEAR LANCEY—I am so glad to hear of your intended marriage with Ellen Nicholl, and as I promised to assist you at starting, I am happy to tell you that I will pay to you 150 pounds yearly during my life and until your annual income derived from your profession of a chancery barrister shall amount to £00 guineas, of which your own admission will be the only evidence that I shall require.

"Your affectionate uncle,

"CHARLES SHADWELL."

It was held that the promise was binding and made upon good consideration.

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In *Lakota v. Newton*, an unreported case in the Superior Court of Worcester, Mass., the complaint averred defendant's promise that "if you (meaning plaintiff) will leave off drinking for a year I will give you \$100," plaintiff's assent thereto, performance of the condition by him, and demanded judgment therefor. Defendant demurred on the ground, among others, that the plaintiff's declaration did not allege a valid and sufficient consideration for the agreement of the defendant. The demurrer was overruled.

In *Talbott v. Stemmons* (a Kentucky case not yet reported), the step-grandmother of the plaintiff made with him the following agreement: "I do promise and bind myself to give my grandson, Albert R. Talbott, \$500 at my death, if he will never take another chew of tobacco or smoke another cigar during my life from this date up to my death, and if he breaks this pledge he is to refund double the amount to his mother." The executor of Mrs. Stemmons demurred to the complaint on the ground that the agreement was not based on a sufficient consideration. The demurrer was sustained and an appeal taken therefrom to the Court of Appeals, where the decision of the court below was reversed. In the opinion of the court it is said that "the right to use and enjoy the use of tobacco was a right that belonged to the plaintiff and not forbidden by law. The abandonment of its use may have saved him money or contributed to his health, nevertheless, the surrender of that right caused the promise, and having the right to contract with reference to the subject-matter, the abandonment of the use was a sufficient consideration to uphold the promise." Abstinence from the use of intoxicating liquors was held to furnish a good consideration for a promissory note in *Lindell v. Rokes* (60 Mo. 249).

The cases cited by the defendant on this question are not in point. In *Mallory v. Gillett* (21 N. Y. 412); *Belknap v. Bender* (75 id. 446), and *Berry v. Brown* (107 id. 659), the promise was in contravention of that provision of the Statute of Frauds, which declares void all promises to answer for the debts of third persons unless reduced to writing. In *Beau-*

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mont v. Reeve (Shirley's L. C. 6), and *Porterfield v. Butler* (47 Miss. 165), the question was whether a moral obligation furnishes sufficient consideration to uphold a subsequent express promise. In *Duvoll v. Wilson* (9 Barb. 487), and *In re Wilber v. Warren* (104 N. Y. 192), the proposition involved was whether an executory covenant against incumbrances in a deed given in consideration of natural love and affection could be enforced. In *Vanderbilt v. Schreyer* (91 N. Y. 392), the plaintiff contracted with defendant to build a house, agreeing to accept in part payment therefor a specific bond and mortgage. Afterwards he refused to finish his contract unless the defendant would guarantee its payment, which was done. It was held that the guarantee could not be enforced for want of consideration. For in building the house the plaintiff only did that which he had contracted to do. And in *Robinson v. Jewett* (116 N. Y. 40), the court simply held that "The performance of an act which the party is under a legal obligation to perform cannot constitute a consideration for a new contract." It will be observed that the agreement which we have been considering was within the condemnation of the Statute of Frauds, because not to be performed within a year, and not in writing. But this defense the promisor could waive, and his letter and oral statements subsequent to the date of final performance on the part of the promisee must be held to amount to a waiver. Were it otherwise, the statute could not now be invoked in aid of the defendant. It does not appear on the face of the complaint that the agreement is one prohibited by the Statute of Frauds, and, therefore, such defense could not be made available unless set up in the answer. (*Porter v. Wormser*, 94 N. Y. 431, 450.) This was not done.

In further consideration of the questions presented, then, it must be deemed established for the purposes of this appeal, that on the 31st day of January, 1875, defendant's testator was indebted to William E. Story, 2d, in the sum of \$5,000, and if this action were founded on that contract it would be barred by the Statute of Limitations which has been pleaded, but on that date the nephew wrote to his uncle as follows:

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"DEAR UNCLE — I am now 21 years old to-day, and I am now my own boss, and I believe, according to agreement, that there is due me \$5,000. I have lived up to the contract to the letter in every sense of the word."

A few days later, and on February sixth, the uncle replied, and, so far as it is material to this controversy, the reply is as follows:

"DEAR NEPHEW — Your letter of the 31st ult. came to hand all right saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have \$5,000 as I promised you. I had the money in the bank the day you was 21 years old that I intended for you, and you shall have the money certain. Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. * * * This money you have earned much easier than I did, besides acquiring good habits at the same time, and you are quite welcome to the money. Hope you will make good use of it.
* * *

W. E. STORY.

"P. S.— You can consider this money on interest."

The trial court found as a fact that "said letter was received by said William E. Story, 2d, who thereafter consented that said money should remain with the said William E. Story in accordance with the terms and conditions of said letter." And further, "That afterwards, on the first day of March, 1877, with the knowledge and consent of his said uncle, he duly sold, transferred and assigned all his right, title and interest in and to said sum of \$5,000 to his wife Libbie H. Story, who thereafter duly sold, transferred and assigned the same to the plaintiff in this action."

We must now consider the effect of the letter, and the nephew's assent thereto. Were the relations of the parties thereafter that of debtor and creditor simply, or that of trustee

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and *cestui que trust*? If the former, then this action is not maintainable, because barred by lapse of time. If the latter, the result must be otherwise. No particular expressions are necessary to create a trust. Any language clearly showing the settler's intention is sufficient if the property and disposition of it are definitely stated. (Lewin on Trusts, 55.)

A person in the legal possession of money or property acknowledging a trust with the assent of the *cestui que trust*, becomes from that time a trustee if the acknowledgment be founded on a valuable consideration. His antecedent relation to the subject, whatever it may have been, no longer controls. (2 Story's Eq. § 972.) If before a declaration of trust a party be a mere debtor, a subsequent agreement recognizing the fund as already in his hands and stipulating for its investment on the creditor's account will have the effect to create a trust. (*Day v. Roth*, 18 N. Y. 448.)

It is essential that the letter interpreted in the light of surrounding circumstances must show an intention on the part of the uncle to become a trustee before he will be held to have become such; but in an effort to ascertain the construction which should be given to it, we are also to observe the rule that the language of the promisor is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee. (*White v. Hoyt*, 73 N. Y. 505, 511.) At the time the uncle wrote the letter he was indebted to his nephew in the sum of \$5,000, and payment had been requested. The uncle recognizing the indebtedness, wrote the nephew that he would keep the money until he deemed him capable of taking care of it. He did not say "I will pay you at some other time," or use language that would indicate that the relation of debtor and creditor would continue. On the contrary, his language indicated that he had set apart the money the nephew had "earned" for him so that when he should be capable of taking care of it he should receive it with interest. He said: "I had the money in the bank the day you were 21 years old that I intended for you and you shall have the money certain." That he had set apart the money is further

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evidenced by the next sentence: "Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it." Certainly, the uncle must have intended that his nephew should understand that the promise not "to interfere with this money" referred to the money in the bank which he declared was not only there when the nephew became 21 years old, but was intended for him. True, he did not use the word "trust," or state that the money was deposited in the name of William E. Story, 2d, or in his own name in trust for him, but the language used must have been intended to assure the nephew that his money had been set apart for him, to be kept without interference until he should be capable of taking care of it, for the uncle said in substance and in effect: "This money you have earned much easier than I did * * * you are quite welcome to. I had it in the bank the day you were 21 years old and don't intend to interfere with it in any way until I think you are capable of taking care of it and the sooner that time comes the better it will please me." In this declaration there is not lacking a single element necessary for the creation of a valid trust, and to that declaration the nephew assented.

The learned judge who wrote the opinion of the General Term, seems to have taken the view that the trust was executed during the life-time of defendant's testator by payment to the nephew, but as it does not appear from the order that the judgment was reversed on the facts, we must assume the facts to be as found by the trial court, and those facts support its judgment.

The order appealed from should be reversed and the judgment of the Special Term affirmed, with costs payable out of the estate.

All concur.

Order reversed and judgment of Special Term affirmed.

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BENJAMIN KNOWER et al., Appellants, v. THE CENTRAL NATIONAL BANK, Impleaded, etc., Respondent.

THE FIRST NATIONAL BANK of Paterson et al., Appellants, v. THE CENTRAL NATIONAL BANK, Impleaded, etc., Respondent.

An assignment for the benefit of creditors in due form is valid as between the parties to it, and, upon acceptance of the trust by the assignee, he becomes bound to execute its directions. If fraudulent as against creditors, it is only voidable by adjudication at their election, or that of some one of them, and until an attack is made with a view to such a judicial determination, it will be treated as valid and must be executed accordingly.

Title is vested in the assignee for the purpose merely of executing the trust in the manner directed; a creditor, paid pursuant to such directions, receives his debt through the execution of the trust, and his title is supported by the pre-existing debt upon which payment has been made, pursuant to the right of the debtor to make and the creditor to receive it.

Payment, therefore, by an assignee for the benefit of creditors, to a preferred creditor of the assignor of the amount of a debt honestly due him, pursuant to the directions in the assignment, before any lien has been obtained upon the fund, is effectual to vest title in such creditor to the money so paid, although the assignment, in an action subsequently commenced, is adjudged fraudulent and void as against the creditors.

Hone v. Henriquez (13 Wend. 240), distinguished.

The mere fact of knowledge on the part of the creditor so paid of the intent of the debtor to defraud his other creditors by the disposition of his property in payment of the debt, does not prejudice the right of the creditor to seek and obtain payment.

Mackie v. Cairns (5 Cow. 547), distinguished.

Accordingly, *held*, that the rights of a bank, a preferred creditor, were not prejudiced by the fact that after the making of the assignment and with knowledge of the fraudulent intent on the part of the assignors, it obtained judgment by confession from them for the amount of the preferred debt, issued execution thereon, and by its directions the sheriff allowed the assignee to sell the assigned property, and returned the execution unsatisfied.

In an action by a creditor, after obtaining a judgment setting aside such an assignment as fraudulent, against a preferred creditor who had been paid the amount of his preferred claim by the assignee before the bringing of said action to set aside the assignment, to recover back the money

184 552
127 60
127 396

194 552
130 599
132 179

124 552
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124 552
147 594

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162 319

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paid, *held*, that knowledge on the part of defendant at the time of the payment that a suit was then pending in behalf of creditors, other than the plaintiffs, to set aside the assignment, did not prejudice defendant; that such other action was in its effect and result only available to the plaintiffs therein.

(Argued March 9, 1891; decided April 14, 1891.)

APPEALS from final judgments of the General Term of the Supreme Court in the first judicial department, entered upon orders made July 9, 1889, which affirmed interlocutory judgments entered upon orders of Special Term sustaining demurrers to the complaints in the actions above entitled.

The main and ultimate purpose of the actions was to require the defendant bank to refund a sum of money received by it from the assignee for the benefit of creditors of Halstead, Haines & Co.

To support such relief in behalf of the plaintiffs in the first action, it was alleged in the complaint that in July, 1884, Halstead, Haines & Co., being possessed of a stock of goods of the value of \$450,000, and other property, made to one May a general assignment for the alleged benefit of their creditors, and by it directed the assignee to pay a large number of preferred debts amounting to about \$409,000, among which was the claim of the defendant bank amounting to \$40,000; that on or about the 17th day of October, 1884, that sum was paid by him to such bank; that on September 20 and October 18, 1884, the plaintiffs recovered judgments against Halsted, Haines & Co., upon which executions were issued and returned unsatisfied; that in January, 1885, actions were commenced by the plaintiffs against such assignors and assignee to set aside the assignment upon the ground that it was made with intent to hinder, delay and defraud the creditors of the assignors; and that on December twelfth and thirteenth, judgments in such actions were obtained and entered, setting aside the assignment on that ground. Plaintiffs further alleged on information and belief, that after having made the assignment with such fraudulent intent and in August, 1884, Halsted, Haines & Co., in furtherance

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of such fraudulent design colluded with the creditors whose claims were preferred, by which each of them, including the defendant bank, with full knowledge of the fraudulent design of Halsted, Haines & Co., and with like design on their part, obtained judgments against Halsted, Haines & Co. for their claims so preferred, it being confessed by them in favor of such bank; that executions were issued upon such judgments to the sheriff, requiring him to seize and hold the assigned property and thereby secure the same from the efforts of the unpreferred creditors to secure thereout their demands and to enable the assignee to sell under the assignment; and that the sheriff, acting upon the instructions of the preferred creditors, allowed the assignee to sell the property under the assignment, which he did, and the executions were returned unsatisfied. The plaintiffs also alleged that at the time the defendant bank received payment of the amounts of its preference a suit commenced in September, 1884, in favor of parties named (other than any of these plaintiffs), creditors of Halstead, Haines & Co., to set aside the assignment upon the ground before mentioned, was pending; and that the defendant bank knew of its existence and object, and that in January, 1888, judgment was therein entered setting aside the assignment. Then followed the allegation that the assignment was made by Halsted, Haines & Co., with intent to hinder, delay and defraud their creditors including the plaintiffs, who were such at the time it was made.

The complaint in the other action does not allege the recovery of any judgment by plaintiff setting aside the assignment. Nor is it there claimed that the defendant bank was in any way connected with any fraud in the assignment or its execution. In other respects the complaint is substantially the same as in the action first mentioned. One of the grounds of demurrer in each was that the complaint did not state facts sufficient to constitute a cause of action.

John J. Adams for appellants. The plea that there is a defect of parties defendant, in that neither the assignee nor his substitute

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are made parties defendant, is untenable. (*Wheeler v. Wheelon*, 9 How. Pr. 293; *Hammond v. H. Co.*, 20 Barb. 381; *Loos v. Wilkinson*, 110 N. Y. 210; *Starin v. Kelly*, 88 id. 418; *Hillman v. Hillman*, 14 How. Pr. 456; Code Civ. Pro. § 452; *Wallace v. Eaton*, 5 How. Pr. 99; *Wing v. Bull*, 38 Hun, 291.) The fourth ground of demurrer that the complainants have not legal capacity to sue, for the reason that the cause of action, if any, is vested in the receiver mentioned in the complaint is untenable. (*Hunt v. Wolfe*, 2 Daly, 303; *Gere v. Gible*, 17 How. Pr. 31; *Bennett v. McGuire*, 5 Lans. 187; *Conger v. Sands*, 19 How. Pr. 10; *Barley v. Belmont*, 10 Abb. [N. S.] 370; *Cassilaer v. Simmons*, 8 Paige, 273; *Fincke v. Funk*, 25 Hun, 616; *Foster v. Townsend*, 68 N. Y. 203; *Kieney v. H. Ins. Co.*, 71 id. 401; *Green v. Bostwick*, 11 Sandf. Ch. 565; *Wright v. Nostrand*, 94 N. Y. 42; *Bostwick v. Menck*, 46 id. 383; *C. C. Bank v. Risby*, 19 id. 369.) The complaint alleges: "That the assignment was made with intent to hinder, delay and defraud the creditors of the assignors, including these plaintiffs." It also alleges that the money sought to be recovered was paid to the defendant creditors out of the proceeds of the assigned estate and under and by virtue of the preference contained in the fraudulent instruments and not otherwise. These allegations are sufficient and proper. (*Platt v. Mead*, 9 Fed. Rep. 98; *Morgan v. Bogue*, 7 Neb. 429; *Mott v. Dunn*, 10 How. Pr. 225; *Rathbun v. Platner*, 18 Barb. 272; *Loos v. Wilkinson*, 110 N. Y. 210; *Starin v. Kelly*, 88 id. 418.) A creditor can recover money paid under an instrument admitted to have been executed to defraud him. (Bump. on Fraud. Conv. 352; *Chapin v. Thompson*, 89 N. Y. 270; *Dudley v. Danforth*, 61 id. 626.) An assignment by a debtor, whether solvent or insolvent, of all his property to trustees for the benefit of his creditors is void if made with intent on the part of the assignor alone to hinder, delay and defraud his creditors, without reference to the intent on the part of the assignee or the creditors. (*Knapp v. McGowan*, 96 N. Y. 88; *Tiemeyer v. Turnquist*, 85 id. 522; *Rathbun v. Platner*, 18 Barb. 272; *O. Bank*

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v. *Olcott*, 46 N. Y. 19.) The assignment being fraudulent and, therefore, void, the property remained and still remains, as to these appellants, the property of the assignors, and the lien created by this action is upon that property although in the possession of the respondent. (*Austin v. Bell*, 20 Johns. 451; *Hone v. Henriquez*, 13 Wend. 240; *Albert v. Back*, 19 J. & S. 550; *Washbury v. Brooks*, 7 Wheat. 379.) The general or so-called general assignment was not as to these appellants valid at the time of the payment to the respondents. (*Loos v. Wilkinson*, 110 N. Y. 214; *People v. Chalmers*, 60 id. 159; *Lawrence v. Bouk*, 33 id. 323; *Webb v. Daggett*, 2 Barb. 9; *Billings v. Russell*, 101 N. Y. 231; *Colburn v. Morton*, 26 How. Pr. 105; *Pond v. Comstock*, 20 Hun. 492; *Mackie v. Cairns*, 5 Cow. 547; *Bump on Fraud. Conv.* 352.) The assignment must stand as a whole or not at all. (*Boyd v. Dunlap*, 1 Johns. Ch. 482; *O'Neill v. Solman*, 25 How. Pr. 247; *Bump on Fraud. Conv.* 366, 367; *O. L. & C. Bank v. Talcott*, 19 N. Y. 148.) The assignee is accountable for and bound to refund moneys which he has received as a preferred creditor. (*Riggs v. Murray*, 2 Johns. Ch. 555, 582; *Mitchell v. Van Buren*, 28 N. Y. 300; *U. Bank v. Brush*, 36 id. 631; *Bostwick v. Beizer*, 10 Abb. Pr. 197; *Coope v. Bowles*, 42 Barb. 87; *Rathbun v. Platner*, 18 id. 272; *G. Bank v. Bank of Batavia*, 43 Hun, 295; *Van Nest v. Yoe*, 1 Sandf. Ch. 16; *Hone v. Henriquez*, 13 Wend. 240; *Chapin v. Thompson*, 89 N. Y. 280.) It is the Statute of Frauds to which we must look to determine the relative rights of the plaintiffs and the defendants, and we submit that the natural and most unstrained construction of the statute sustains the view contended for throughout by the appellant — that a creditor as to his antecedent debt claiming under a general assignment declared void for fraud is not a purchaser for value without notice within the meaning of that statute. (*Schovill v. Shed*, 36 Hun, 167; *In re Howe*, 1 Paige, 126; *Seymour v. Wilson*, 19 N. Y. 420; *Wood v. Robinson*, 22 id. 568; *Van Hoesen v. Radcliff*, 17 N. Y. 583; *Birdseye v. Ray*, 5 Den. 626; *Anderson v. Roberts*, 18 Johns. 513; *Starin v. Kelly*, 88 N. Y. 418; *Loos v. Wil-*

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kinson, 110 id. 210; *Leitch v. Hollister*, 4 id. 211; *Dunham v. Whitehead*, 21 id. 313; *Tiffany v. Warner*, 37 Barb. 464; *Rathbun v. Platner*, 18 id. 272.)

George A. Strong for respondent. The novelty of the claim advanced by plaintiff is itself a strong argument against its validity. (*Fluck v. State*, 95 N. Y. 468; *Mowry v. Peet*, 88 id. 457; *Ryan v. N. Y. C. R. R. Co.*, 35 id. 216; *Hearle v. Greenbank*, 3 Atk. 710.) There are authorities which really in principle cover and control the case at bar. (*Murphy v. Briggs*, 89 N. Y. 446; *Seymour v. Wilson*, 19 id. 417; 112 U. S. 593; *Pond v. Comstock*, 20 Hun, 494; *Collumb v. Read*, 24 N. Y. 515; *Sullivan v. Miller*, 106 id. 643, 644; *Wakeman v. Grover*, 4 Paige, 42, 43; *Ames v. Blunt*, 5 id. 22, 23; *Butler v. Stoddard*, 7 id. 166.) The theory of this action is not consistent with sound principles. (*Collumb v. Read*, 24 N. Y. 515; *Murphy v. Briggs*, 89 id. 453; *Cramer v. Blood*, 57 Barb. 155; 48 N. Y. 684; *Inglehart v. T. I. Hotel*, 109 id. 463.) The original assignee is a necessary party defendant. (*Murphy v. Riggs*, 89 N. Y. 446; *Collumb v. Read*, 24 id. 515; *Jackson v. Andrews*, 98 id. 675.) The decree setting aside the assignment is in no way binding upon the Central National Bank. (*People v. Supervisors*, 34 N. Y. 269; *Stocum v. Clark*, 2 Hill, 476; *Ferriss v. N. A. Ins. Co.*, 1 id. 74.) The averments in the complaint do not show any fraud in the assignment or on the part of the assignors, much less any fraud on the part of the Central National Bank. (*Wood v. Amory*, 105 N. Y. 282; *Cohn v. Goldman*, 76 id. 284; *Rich v. N. Y. C. & H. R. R. R. Co.*, 87 id. 394; *O'Callaghan v. Cronan*, 121 Mass. 114.) The action brought by creditors, other than these plaintiffs, to set aside the assignment, can have no weight in the case at bar. (*Bostwick v. Menck*, 40 N. Y. 383.) A demurrer will lie to a complaint, though it state a good cause of action, if it also state facts constituting a defense. (*Calvo v. Davies*, 73 N. Y. 211; *Broome v. Taylor*, 76 id. 564.)

BRADLEY, J. This controversy presents the question whether or not a creditor of an assignor for the benefit of creditors can

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retain the money paid to him by the assignee pursuant to the direction in the assignment, as against another creditor, who by action subsequently brought succeeds in setting aside the assignment as fraudulent against the creditors of the assignor. It is urged on the part of the plaintiffs that the creditor, receiving payment of his debt from the assignee, takes it subject to the condition that the assignment remains effectual; and that when the assignment falls, the title of the creditor to the money so paid him pursuant to its direction fails; and that, for the purpose of the remedy of the attacking creditors, the money so paid must be treated as part of the estate of the debtor to be accounted for by the creditor receiving it. This proposition is founded upon the assumption that he receives the payment and takes the money through the title vested by the assignment in the assignee, and not otherwise.

It is a familiar rule that a debtor may voluntarily pay such of his creditors as he pleases, and they may take payment to the exclusion of others, and thus exhaust all his property. And at the time the one in question was made, an insolvent debtor might legitimately accomplish the same thing by means of a preferential assignment of his entire property for the benefit of his creditors. Although this necessarily had the effect to withdraw his estate from the ordinary legal process, and thus operated to hinder the creditors in the collection of their debts, it was valid if made in good faith, and did not unnecessarily by its directions delay the appropriation of the assigned property to the payment of creditors in the order provided for by the assignment. When the trust is accepted by the assignee, he may be compelled to execute its directions, and it is irrevocable by the assignor. And the question whether or not an assignment is fraudulent in fact as against the creditors of the assignor, is not important for the purposes of the execution of it by the assignee, unless an attack by action is made upon it by them or some of them. Until then his duty to proceed in its execution continues. And consistently with that duty he is entitled to have allowed to him all payments before then made by him of and upon debts of the assignor in

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accordance with the instructions given by the terms of the assignment. (*Ames v. Blunt*, 5 Paige, 15; *Collumb v. Read*, 24 N. Y. 505; *Pond v. Comstock*, 20 Hun, 492; 87 N. Y. 627.)

All the creditors of the debtor are entitled to payment of their lawful claims against him if his property is sufficient to pay them; and those given a preference by his assignment are entitled to payment by force of the directions contained in it, while the assignee is at liberty to execute them. The title is vested in an assignee for the purpose merely of executing the trust in the manner directed, and essentially so to enable him to do it. And when payment is made by an assignee to the creditor pursuant to such directions, the latter receives the fund from the debtor through the execution of the trust, and his title is supported by the pre-existing debt upon which payment is made pursuant to the right of the debtor to make and the creditor to receive it. By the commencement of an action in equity by a judgment creditor to reach the property of his debtor, he obtains a lien upon the choses in action and equitable interests of the latter, which lien becomes effectual upon the recovery of judgment for the relief sought. (*Eameston v. Lyde*, 1 Paige, 637; *Eager v. Price*, 2 id. 333.) This rule is not to the same extent applicable to property subject to levy of execution. (*Albany City Bank v. Schermerhorn*, Clark, 297; *Davenport v. Kelly*, 42 N. Y. 193.) No action affecting this case in which any of these plaintiffs were parties or represented as such, was brought until after payment was made to the defendant; and no lien by relation to a time prior to that, was acquired by them on the fund so paid. They must rest their claim to recover, upon the position that because the assignment was fraudulent as against the creditors of the assignor, the title to the money paid never passed to the defendant, but remained in the debtor. It is true that the theory upon which property fraudulently assigned is reached by a creditor, on adjudication to that effect, is that title has not passed from the assignor; and such is the ground upon which a levy of execution upon assigned property is effectually supported. It may be observed that an assignment being valid

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between the parties to it is, if fraudulent as against creditors, only voidable by adjudication at their election, or that of some or one of them; and unless an attack is made with a view to such judicial determination, it will be treated as valid and must be executed accordingly. And when faithfully executed by the assignee without such challenge by any creditor, it is difficult to see any sound principle upon which the results should be subverted. Diligence may defeat its execution, but to hold that, so far as the trust has been performed, no rights have been effectually taken from it, would render it unsafe for any creditor to accept payment otherwise than by force of adjudication, or after the validity of an assignment is in that manner established. It is, however, urged that an antecedent debt does not furnish a supporting consideration for money paid to enable the receiving creditor to retain it as against another who proceeds upon or successfully for an adjudication of the invalidity of an assignment pursuant to which the payment is made. It is not seen that the doctrine sought to be applied in its relation to the transfer of property necessarily aids the plaintiffs. The sale of property to a creditor in payment of a debt, and taken by the latter solely for the purpose of such payment, cannot be defeated by another creditor by reason of the fraudulent intent on the part of the vendor, although the purchaser was cognizant of such intent of the vendor. (*Dudley v. Danforth*, 61 N. Y. 626.) And while the sale to the creditor has in the debt due him a valuable consideration for its support, he will not, without the aid of some new consideration be treated as a *bona fide* purchaser in such sense as to take title paramount to a prior equity or lien existing in favor of another. (*Ray v. Birdseye*, 5 Denio, 619; *Wood v. Robinson*, 22 N. Y. 567; *Seymour v. Wilson*, 19 id. 421.) This doctrine would be applicable to the case at bar if the plaintiffs had acquired a lien on the fund or the property producing it, prior to the time the payment was made to the defendant bank. But the contrary is the fact; and at that time the equity of the defendant was equal to that of plaintiffs. The title of the defendant to the money paid upon its claim did

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not depend for support upon that of the assignee, as would be the case of a stranger taking a transfer of property from the trustee, but the payment was a performance of the directions of the assignor in his assignment, and by force of those directions the fund passed from the assignor through the act of the assignee to the defendant in discharge of the debt due to it, and it would seem that the latter could rest upon its right to take the money paid and retain it, supported by title, as effectually as if it had, without the aid of an assignee, been paid to him directly by the debtor. (*Nat. B. & D. Bank v. Hubbell*, 117 N. Y. 397.) This view is not inconsistent with the fact that, when an assignment is set aside, the functions of the assignee cease and the entire provisions of the instrument fall. By reason of the voidable rather than the void nature of such an instrument, and of the fact that it is valid between the parties to it, the instructions given by it remain effectual, and the execution of them may proceed until interrupted by some legal process or proceeding having that effect. The view here taken is that the invalidity of the assignment established in the subsequent actions of the plaintiffs, did not have the effect to restore the fund paid to the defendant to the estate of the debtor for the purpose of relief in their behalf, nor was it subject to any lien in their favor as creditors of the assignor. Our attention is called to no adjudicated case presenting this precise question, but *Murphy v. Briggs* (89 N. Y. 446) has analogously in principle some application to the subject. There a debtor conveyed real estate in fraud to his creditors, and at his request the grantee made a mortgage upon the premises to a creditor of the grantor to secure the payment of a debt due from the latter to the mortgagee. The position was taken by the attacking creditors, there as here, that as the deed was set aside there was no title in the grantee to support the mortgage. But the court held in effect that the security for the payment of the debt was, in legal effect, furnished by the grantor through his grantee, who then being apparently vested with the legal title, was the instrument to execute the mortgage, and that the mortgagee had, in the debt which it

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was given to secure, a valuable consideration. In that case the mortgage was dependent for its support upon title in the mortgagor, while in the present one the payment may have been effectually made upon the mere instructions or directions of the debtor given to a person appointed by him to make it, unaided by title in the person executing such directions. The nature of the relation between an assignor and assignee for the benefit of creditors is not one of contract, but the assignee takes his position as such by appointment; and because the assignor, after making such assignment embracing his directions, ceases to have any dominion over the property, any successor to the assignee on his retirement by resignation or otherwise from the trust can only be appointed by the court. This has no essential bearing upon the question here further than it tends to illustrate the fact that the title is given to the assignee, simply to enable him to execute the directions of the assignor embraced in the instrument by which he is appointed. The fact, as has been held, that the assignee cannot, as against a creditor successfully attacking an assignment, retain moneys in payment of a preferred debt due from the debtor to him, or to a firm of which he is a member, is not inconsistent with the right of another creditor to hold that paid to him upon a debt due him from the assignor. The reason for this difference evidently arises out of the relation of the assignee as a party to the instrument creating a trust, and who is charged with its execution; and theroetically his right to funds which he is authorized by the assignment to take and apply to his own use, is not entirely perfected until his account of the execution of the trust is rendered and in some manner approved or established. This rule is generally applicable to trustees, and by statute is applied to executors and administrators who have claims against the estates represented by them.

In *Hone v. Henriquez* (13 Wend. 240) the question had relation to the claim of right by a creditor to set off his debt against the proceeds of property placed by the assignor in his hands to sell. The assignment was adjudged fraudulent and void and it was properly held he could not make the set-off.

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His was not a case of payment, and he had no claim of title. The question here did not arise in that case. These views lead to the conclusion that payment by the assignee to a creditor of the assignor of the amount of the debt due him pursuant to the directions in the assignment before any lien is obtained upon the fund, is effectual to vest title in such creditor to the money so paid, although the assignment is, in an action subsequently commenced, adjudged fraudulent and void as against the creditors of the assignor.

We have thus far proceeded upon the assumption that the defendant had not in any manner participated in the fraud charged against the assignor.

The allegations in the complaint in the Knower action charging the collusion, after the assignment was made, of the assignors with the defendant and other preferred creditors, resulting in judgments and executions, and finally a sale of the property by the assignee and the return of the executions unsatisfied, would be effectual to support the action if the validity of the defendant's debt against the assignor were challenged by any allegation in the complaint. But in considering the question arising upon the charge referred to, it must still be assumed that such debt was honestly due from the assignor to the defendant. This charge had relation only to transactions after the assignment was made; and was to the effect that the defendant, with knowledge of the fraudulent design of the assignor, was seeking to obtain payment of the debt due to it. The only allegation tending to show a purpose to prejudice other creditors was that the defendant and such other preferred creditors directed the sheriff to seize and hold the assigned property upon the executions, and "thereby secure the same from the just and legal efforts of the unpreferred creditors to secure payment thereof of their just demands against the same, and to enable the said assignee to sell and dispose of the same under said alleged general assignment." No inference necessarily arises from such allegation that the defendant acted with any purpose other than to secure the payment of its own debt; and with that view it was at liberty

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to procure confession by the assignor of judgment, issue execution and direct the sheriff to levy it on the property. And, as has already been observed, the mere fact of knowledge on the part of a creditor of the intent of his debtor to defraud his creditors by the disposition of his property to pay or in payment of the debt due from him to the former, does not prejudice the right of the creditor to seek and obtain payment. The case of *Mackie v. Cairns* (5 Cow. 547) has no necessary application to this branch of the present case. There the assignor, after making a general assignment for the benefit of creditors, which by reason of trusts reserved for his benefit was apparently fraudulent as against his creditors, confessed a judgment to the assignees, as such, while the assignment remained valid between the parties to it. The assignment and judgment were held to be fraudulent as against the creditors. The judgment so confessed and taken was intended to be resorted to only in the event the assignment should be adjudged invalid, and in the meantime the purpose of the assignees was to proceed in execution of the assignment. The result of the final determination was that the judgment was infected with the same vice as was the assignment itself. In the present case the confession of judgment was to a creditor and founded upon a valid debt. And it must be assumed that the defendant took it for its own benefit. This it had a right to do.

It is not seen how knowledge of the defendant at the time of the receipt of payment of its debt, that a suit was then pending in behalf of parties other than any of the plaintiffs here to set aside the assignment, can aid the plaintiffs or as against them prejudice the defendant. The other action referred to was in its effect and result available only to the parties plaintiff in it, and for the purpose and to the extent of their claim only, against the assignor would the adjudication in their favor set aside the assignment. (*Bostwick v. Menck*, 40 N. Y. 383.)

There is no other question requiring consideration.

The judgments should be affirmed.

All concur.

Judgments affirmed.

Statement of case.

WILLIAM L. WHITTEMORE, as Administrator, etc., Appellant,
v. THE JUDD LINSEED AND SPERM OIL COMPANY et al.,
Respondents.

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Where a release of one of two joint debtors contains an express provision that it shall not affect or impair the claim of the creditor against the other debtor, the latter is not discharged.

An undivided part of a demand may be sold and transferred, and if all the owners of the demand unite in a suit upon it the fact of the assignment constitutes no defense.

Defendant, the J. L. & S. Oil Co., brought an action upon an alleged joint claim against T. & H. T. alone defended, denying any liability on his part. The action was determined in favor of the plaintiff therein; one roll was filed, but separate judgments were entered against the defendants for different amounts, the one against T. being the greater by the amount of the costs and interest. In an action to restrain the collection of the judgment against H., *held*, that the judgments could not be considered as joint; and that a release of T. did not, in the absence of any claim of payment by either debtor, affect the right of the judgment creditors as against H.

Also *held*, that the judgment against T. could be separately assigned without affecting the rights of the creditor as against H.

(Argued March 12, 1891; decided April 14, 1891.)

APPEAL from judgment of the General Term of the Court of Common Pleas of the city of New York, entered upon an order made June 2, 1890, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

This action was brought to restrain the collection of a judgment recovered against Henry W. Hubbell by the Judd Linseed and Sperm Oil Company, and to have it adjudged that such judgment, so far as it was a claim or demand against Hubbell, was satisfied and discharged.

Hubbell died pending the litigation, and the action was continued by his administrator.

It appeared that Hubbell and one Robert L. Taylor, who had been engaged in various joint enterprises, became insolvent in 1867, and made a joint assignment of their joint estate

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and separate assignments of their individual estates to assignees for the benefit of creditors.

The oil company had a claim against them upon which Taylor denied any liability, and after making an agreement with the assignees to compromise said claim, so far as Taylor was concerned, for fifty cents on the dollar in case it established Taylor's liability therefor, brought an action thereon against both parties.

Taylor alone defended and the action against him was tried and resulted in favor of the oil company, whereupon judgment was entered. But one roll was filed. The final statement in the judgment was dual in form and a separate judgment was entered against Hubbell for \$40,950.29, and against Taylor for \$43,420.70. The difference in amount represented the difference in costs and interest.

On August 15, 1872, the oil company assigned to the defendant Lord all their claims and demands against Robert L. Taylor individually and especially all its right, title and interest in and to a certain judgment for \$43,420.70 and all its right, title and interest in and to money due and to grow due under the same from said Robert L. Taylor or his individual estate.

Said assignment further provided as follows: "It is expressly understood that said Judd Linseed and Sperm Oil Company are to retain and do expressly retain all their claims and rights of every nature against the joint property and estate of said Robert L. Taylor and Henry W. Hubbell, and against the individual property and estate of said Henry W. Hubbell. It being intended hereby to transfer only such claims as they have against the said Robert L. Taylor individually and his individual estate in whatever way the same may be made available for the payment thereof."

Negotiations followed for the settlement of the several estates the object being to release and discharge the assignees and to transfer to Hubbell certain property and claims, particularly a claim against the United States growing out of the destruction of a ship by the confederate cruiser Alabama, which it was claimed by him had not passed to the assignees.

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To accomplish this Hubbell professed to have procured and to be able to procure releases of the assignees from all the creditors and consents to their discharge, except from four, among whom was the oil company. A tripartite agreement was entered into between the surviving assignees and Taylor and Hubbell, which recited these facts, and the fact that the oil company's claim was to remain outstanding.

In these negotiations Mr. Lord represented Taylor, the assignees and certain creditors. Hubbell was represented by Mr. Peet.

On August 8, 1874, there were delivered by Mr. Peet two releases; one dated September 30, 1873, which was an agreement between certain creditors and Hubbell and which released and discharged the assignees from all claims and demands and right of accounting, and provided that nothing therein contained should impair or affect the claims of said creditors against Hubbell individually or prejudice their rights against him personally or any estate of his not then in the hands of the assignees.

The second release was dated January 5, 1874, and was an agreement with Hubbell of a like character and released Taylor from all claims and demands against him, and the assignees from all claims and demands and right of accounting against them, and contained a similar reservation of the releasors' claims against Hubbell individually and against any estate of his not in the hands of the assignees.

The oil company was a party to each of the foregoing instruments. The defendant Lord also executed and delivered to Hubbell a release under seal from all claims against him or his individual estate upon certain demands of which Lord claimed to be the owner, among which the demand of the oil company was specified as one. Some question appears to have arisen between Hubbell and Lord as to Lord's authority to execute this release under the assignment of August 15, 1872, and thereafter Hubbell procured from the oil company a further assignment dated October 6, 1874, whereby said company assigned to Lord "all their claims against the joint property and estate of Robert L. Taylor and Henry W. Hubbell in the

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and separate assignments of their individual estates to assignees for the benefit of creditors.

The oil company had a claim against them upon which Taylor denied any liability, and after making an agreement with the assignees to compromise said claim, so far as Taylor was concerned, for fifty cents on the dollar in case it established Taylor's liability therefor, brought an action thereon against both parties.

Taylor alone defended and the action against him was tried and resulted in favor of the oil company, whereupon judgment was entered. But one roll was filed. The final statement in the judgment was dual in form and a separate judgment was entered against Hubbell for \$40,950.29, and against Taylor for \$43,420.70. The difference in amount represented the difference in costs and interest.

On August 15, 1872, the oil company assigned to the defendant Lord all their claims and demands against Robert L. Taylor individually and especially all its right, title and interest in and to a certain judgment for \$43,420.70 and all its right, title and interest in and to money due and to grow due under the same from said Robert L. Taylor or his individual estate.

Said assignment further provided as follows: "It is expressly understood that said Judd Linseed and Sperm Oil Company are to retain and do expressly retain all their claims and demands of every nature against the joint property and estate of Robert L. Taylor and Henry W. Hubbell, and against the individual property and estate of said Henry W. Hubbell, being intended hereby to transfer only such claims and demands against the said Robert L. Taylor individually and his individual estate in whatever way the same may be made for the payment thereof."

Negotiations followed for the settlement of the case, the object being to release and discharge Taylor from the transfer to Hubbell certain property and claim against the United States growing out of a ship by the confederate cruiser claimed by him had not passed to the

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hands of their assignees under the assignment dated October 26, 1867, under and by virtue of a judgment against said Taylor and Hubbell in the Court of Common Pleas, etc., for \$43,420.70 granting to Lord power and authority to ask and demand the same from the assignees and from any person or persons excepting as against Hubbell or any individual estate or joint estate hereafter realized by him."

On April 1, 1876, the oil company issued an execution upon said judgment with directions to the sheriff to satisfy the same out of Hubbell's property and claiming \$25,060.25 and interest to be due thereon.

Wm. C. De Witt and Edwin B. Smith for appellant. The debt being joint, and all the proceedings thereupon having been based on a joint liability, the judgment must be deemed to be joint, irrespective of its final and dual statement. (Freem. on Judgts. § 38; *Fish v. Emerson*, 44 N. Y. 378; *Tompkins v. Sands*, 8 Wend. 466; *Hall v. Marks*, 34 Ill. 363; *Mattheus v. Houghton*, 11 Me. 377; *Morrill v. Foster*, 33 N. H. 384, 385; *Lawrence Case*, 18 Abb. Pr. 347; *Townsend v. Wesson*, 4 Duer, 363, 354; *Forsyth v. Campbell*, 15 Hun, 237, 238; *McGuire v. Kouns*, 7 B. Mon. 386; *Adams v. Olive*, 62 Ala. 420; *Mason v. Wolff*, 40 Cal. 249; *Harper v. Rowe*, 53 id. 234; *Carrick v. Armstrong*, 2 Cold. 265; *Gest v. R. R. Co.*, 30 La. Ann. 28; *Cambell v. Rankin*, 99 U. S. 263; *Cromwell v. Sac Co.*, 94 id. 351; *Young v. Black*, 7 Cr. 565; *Wood v. Jackson*, 8 Wend. 44, 45; 24 How. [U. S.] 344; *Elwell v. McQueen*, 10 Wend. 520; *F. N. Bank v. Neyhardt*, 13 Blatchf. 394; *Goddard v. Coffin*, 2 Ware, 385; *Whitney v. Townsend*, 67 N. Y. 43; *Boyd v. Zacherie*, 6 Pet. 641; *Foster v. Wood*, 1 Abb. [N. S.] 150; *Ticknor v. Kennedy*, 4 id. 419; *Gilliam v. Spratt*, 8 id. 15; *Blum v. Hartman*, 3 Daly, 48; *McCouns v. Holmes*, 4 Litt. 389; *Conrad v. Ciffey*, 11 How. [U. S.] 492; *Finnegan v. Manchester*, 12 Ia. 521; *Wilson v. Nance*, 11 Hump. 191; *Little v. Birdwell*, 27 Tex. 688; *Hall v. Dana*, 2 Aiken, 381; *Lamar v. Williams*, 39 Miss. 342; *Ecker v. Bank*, 64 Md. 293; *Campbell v. Wolf*, 33 Mo. 459; *Beers v.*

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Shannon, 73 N. Y. 297.) The judgment entered in the suit on the claim or debt was a joint judgment against Hubbell and Taylor, although each was held to be liable to have execution issued for a different sum by reason of different costs. (*Moot v. Petrie*, 13 Wend. 317; *McCoon v. Biggs*, 2 Hill, 121; *Robertson v. Smith*, 18 Johns. 459, 471; *Olmstead v. Webster*, 8 N. Y. 413.) What the law makes joint is not divisible by assignment either in itself or in its lien. (*Bronson v. Fitzburgh*, 1 Hill, 185; *Bank of Poughkeepsie v. Ibbotson*, 5 Hill, 461; *Hoffman v. Dunlap*, 1 Barb. 185; *Oakley v. Aspinwall*, 1 Duer. 18; *DeLong v. Curtis*, 35 Hun, 94; *Brown v. Williams*, 4 Wend. 366, 367; *Mitchell v. Allen*, 25 Hun, 543; *Lovejoy v. Murray*, 3 Wall. 1; *Irvine v. Milbank*, 15 Abb. [N. S.] 378; 56 N. Y. 635; *Knickerbocker v. Cohen*, 8 Cow. 111; *Gunther v. Lee*, 45 Md. 50; *Ruble v. Turner*, 2 H. & M. 38; 7 Johns. 207; *Olmstead v. Webster*, 8 N. Y. 413; *Robeson v. Smith*, 18 Johns. 459.) The release here being under seal was a technical one and cannot be construed as a mere covenant not to sue. (*Irvine v. Milbank*, 15 Abb. [N. S.] 378; 56 N. Y. 635; *Brown v. Fitzburgh*, 1 Hill, 185; *Rowley v. Stoddard*, 7 Johns. 207; *C. Bank v. Messinger*, 9 Cow. 37; *Hoffman v. Dunlap*, 1 Barb. 185; *Cornell v. Martin*, 35 id. 157; *Parsons v. Hughes*, 9 Paige, 591; *Robertson v. Smith*, 18 Johns. 459; *Olmstead v. Webster*, 8 N. Y. 413; *Stearn v. Tappen*, 5 Duer, 294; *Breslin v. Peck*, 38 Hun, 623.) The debt, being joint, cannot be split up into different pieces and assigned so as to be held by different parties; nor can a debt be so assigned as to charge part of the debt upon one part of debtor's property, and another part upon another part of his property, without the debtor's consent. (Freeman on Judgts. § 424; 1 Black on Judgts. §§ 211, 257; Id. §§ 944, 1125; *Farrington v. Payne*, 15 Johns. 432; *Smith v. Jones*, Id. 229; *Miller v. Covert*, 1 Wend. 487; *Calvin v. Corwin*, 15 id. 557; *Coster v. N. Y. & E. R. R. Co.*, 6 Duer, 43-46; *Faulk v. Kellum*, 54 Ill. 191; *Burnett v. Crandall*, 4 Cent. L. J. 230; *Love v. Fairfield*, 13 Mo. 300; *Shankland v. Mayor, etc.*, 5 Pet. 394.) Whatever right Mr. Lord may have obtained under the assign-

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ment of August 15, 1872, certainly by the assignment of October sixth, of the judgment against Hubbell and Taylor, he became a creditor of a joint debt, and by the terms of the assignment he was obliged to collect the debt out of joint assets of Hubbell and Taylor and not out of the individual assets of Hubbell. (Laws of 1838, chap. 257; Laws of 1841, chap. 848; *Bank of Poughkeepsie v. Ibbotson*, 5 Hill, 461; *Hoffman v. Dunlap*, 1 Barb. 185; *Faulkner v. Suydam*, 7 Robt. 614.) Mr. Lord represented himself in writing to be the owner and holder of the claim of the Judd Oil Company against Robert L. Taylor and Henry W. Hubbell, and for a good and sufficient consideration, under seal, he gave a release from it to Hubbell. And it follows that unless the representation was true and Mr. Lord had the right to discharge Hubbell, he is in equity liable to be required to protect Mr. Hubbell to whatever amount he is called upon to pay on the judgment, at least to the amount which Mr. Lord received or could have received. (Story's Eq. Jur. § 1250; *Riddle v. Mandville*, 5 Cranch. 322, 329, 330; *Russell v. Clarke*, 7 id. 97; *Williams v. Russell*, 19 Pick. 165; *McCall v. Harrison*, 1 Black. 126, 130; *Derham v. Lee*, 87 N. Y. 599, 603, 604; *Jones v. Grant*, 10 Paige, 348, 350; *Kay v. Whittaker*, 44 id. 576, 577; *McHenry v. Hazard*, 45 id. 588; *Neale v. Neales*, 9 Wall. 1; *Oelrichs v. Spain*, 15 id. 228; *Foote v. Linck*, 5 McL. 616; *Wright v. Hooker*, 10 N. Y. 51; *Marie v. Garrison*, 13 Abb. [N. C.] 210, 317, 321; *James v. Cowing*, 25 Wkly. Dig. 97; 2 Story's Eq. Jur. §§ 73, 790-793, 1213, 1250; *Reese v. Kirk*, 29 Ala. 406; *Ord v. McKee*, 5 Cal. 515; *Hunter v. McCoy*, 14 Ind. 528; *Graham v. R. R. Co.*, 3 Wall. 711; *Boone v. Chiles*, 10 Pet. 230; Code Civ. Pro. § 1204; *Smyth v. Monroe*, 84 N. Y. 354; *Drury v. Fay*, 14 Pick. 326.) When this suit was brought it was believed by the plaintiff, as the Common Pleas General Term believed, that Mr. Lord would not have given the release of August eighth unless he had some authority, either by parol assignment or as agent. And when he testified on the trial that such was not a fact, the amendment was asked for that, if the

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release for which he had received large consideration failed, he should be called upon to fulfill it and protect his releasee from the judgment. We submit that this was not an inconsistent remedy, nor did it introduce a new cause of action for damages for fraud or deceit, nor was it a legal and not an equitable claim. (*Graffam v. Burgess*, 117 U. S. 181, 195.)

Joseph H. Choate for respondent, the Judd Linseed and Sperm Oil Company. The holding on the former trial as to the nature of the original judgment as it stands recorded, having been approved by the General Term and by the Court of Appeals, there was no course for the court upon this trial but to dismiss the complaint. Upon this appeal this court will necessarily follow these former rulings. (*Booth v. F. & M. N. Bank*, 74 N. Y. 228.) The assignment of the 15th of August, 1872, did not bar or defeat, or authorize the defendant Lord to release the claim of the defendant the Judd Oil Company against Hubbell. (1 Pars. on Cont. [5th ed.] 29; *Solly v. Forbes*, 2 B. & B. 38; *North v. Wakefield*, 13 Ad. & El. 536; *Thompson v. Lack*, 3 C. B. 540; *Price v. Barker*, 30 Eng. Law & Eq. 157; *Harrison v. Close*, 2 Johns. 449; *Rowley v. Stoddard*, 7 id. 107; *Coulter v. Richmond*, 59 N. Y. 478; *Matthews v. C. M. Co.*, 3 Robt. 711; *Burke v. Noble*, 48 Penn. St. 168; *Yates v. Donaldson*, 5 Md. 380; *Bonney v. Bonney*, 29 Iowa, 448; *Aylesworth v. Brown*, 31 Ind. 270; *Claggitt v. Salmon*, 5 Gill & Johns. 354; *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Couch v. Mills*, 21 Wend. 424; *Hosack v. Rogers*, 8 Paige, 229; *Miller v. Fenton*, 11 id. 18; *Harbeck v. Pupin*, 55 Hun, 335, 339; 123 N. Y. 115; *Green v. Wynn*, L. R. [4 Ch. Div.] 204; 2 Addison on Cont. 1222, 1223; Bishop on Cont. [2d ed.] § 873. If, the release executed by Mr. Lord was not effective at the time of its delivery in August, 1874, it would not become effective by any subsequently executed assignment to him. (*Quarles v. Quarles*, 4 Mass. 688; *Comstock v. Smith*, 13 Pick. 116.) But, even if the assignment of October, 1874, had been

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executed before the delivery of the release to Hubbell, the release would have been wholly ineffectual, for the reason that the assignment of October conferred no right on Mr. Lord to release Hubbell. Where, as here, the decision and judgment are substantially and satisfactorily sustained by evidence not objected to, this court will affirm the judgment, independently of any question arising upon the rejection or admission of evidence. (*Forrest v. Forrest*, 25 N. Y. 510; *In re N. Y. C. & H. R. R. Co.*, 90 id. 347; *McGean v. M. R. Co.*, 117 id. 219, 224.)

S. P. Nash for respondent Lord. Plaintiff should be held to the election which he made to maintain his claim as one based upon an alleged full discharge and satisfaction of the judgment of the Judd Company. (*Fowler v. B. S. Bank*, 113 N. Y. 450; *Conrow v. Little*, 115 id. 387, 393, 394; *Terry v. Munger*, 121 id. 161.) As Lord had, in fact only a restricted and partial ownership, if Hubbell, or his counsel, Peet, knew this, such knowledge precludes any claim as for a breach of warranty or implied covenant of indemnity. (*Bennett v. Buchan*, 76 N. Y. 386.) That the paper of August 8, 1874, was under seal, does not preclude the interpretation of it according to its true meaning, as disclosed by the circumstances of its execution, nor the holding that, under any other interpretation, it would be void for want of consideration. (*Vanderbilt v. Schreyer*, 91 N. Y. 392.) The decision of the court that the relief asked for in the proposed amendment was inconsistent with the cause of action was correct. (*Southwick v. F. N. Bank*, 84 N. Y. 420, 428, 429; *Avery v. N. Y. C. & H. R. R. Co.*, 106 N. Y. 142, 151.)

D. D. Lord for respondent Lord. If errors have been made in the rulings and decision the judgment should stand, because the testimony shows that the plaintiff has no merits, legal or equitable, and a new trial would be of no benefit to him. (*Graham on New Trials*, 301.)

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BROWN, J. The appellant claims that Hubbell's discharge from the judgment was accomplished in two ways.

First. By the release executed by the defendant Lord and delivered to him on August 8, 1874.

Second. By the release of Taylor by the oil company by the instrument of January 5, 1874.

The first ground is the one upon which relief was based in the complaint. The second is not there mentioned or made the basis of the judgment asked for.

While I have grave doubt whether the second claim is available to the appellant under his complaint or whether the question was raised at the trial by any proper and sufficient request to the court thereon; as the facts upon which the claim is now made appear in the findings of the court the point is considered as if it was properly before us.

The second ground upon which the discharge is claimed will be considered first.

The strict common-law rule is that if two persons be bound jointly and severally in an obligation, and the obligee voluntarily and unconditionally releases one of them, both are discharged and either may plead the release in bar.

But the legal operation of a release of one of two or more joint debtors may be restrained by an express provision in the instrument that it shall not operate as to the other.

This question was recently considered in this court in the case of *Hood v. Hayward* (35 N. Y. State Rep. 229, 237; 124 N. Y. 1).

In that case one surety upon a non-resident executor's bond, was released and discharged by the devisees and legatees under the will and the appellant's contention was that by virtue of that release to his co-surety he also was released.

That contention was overruled and it was held that he was not discharged, and the decision rested upon an express provision in the release that it should not be construed as in any way affecting any claim or demand which the releasors had or might have against the non-resident executor or against the appellant as surety on his bond.

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In addition to the authorities cited by Judge Potter in support of that opinion I refer to the following: (1 Parsons on Contracts [5th ed.] p. 29; *Kirby v. Taylor*, 6 John. Ch. 246; *S. C.*, Hopkins' Rep. 309-334; *Rogers v. Hosack*, 18 Wend. 319; 25 id. 313; see opinion of COWEN, J.; *Solly v. Forbes*, 2 Brod. & B. 38; *North v. Wakefield*, 13 Ad. & El. 536; *Burke v. Noble*, 48 Penn. St. 168; *Yates v. Donaldson*, 5 Md. 389; *Edwards v. Varick*, 5 Denio. 665-699; *Lysaght v. Phillips*, 5 Duer, 106-116).

The rule deducible from all the authorities is that equity always gives to a release operation according to the intention of the parties and the justice of the case, and although many early cases may be cited to the effect that the rule applied by courts of law was otherwise, and that a saving clause repugnant to the nature of the grant was void and that the grant remained absolute and unqualified, such is not the modern rule of construction.

The equitable rule now prevails and a release is to be construed according to the intent of the parties and the object and purpose of the instrument, and that intent will control and limit its operation.

Testing the releases in this case by the clear and manifest intention of the parties and the occasion of giving it its operation will be confined to Taylor and it in no way tended to release or discharge Hubbell.

By the terms of the contract, Hubbell was to remain liable, and under all the authorities the release of Taylor operated to discharge him alone.

But the two papers appear to have been delivered by Hubbell's attorney on August 8, 1874, and for the purpose of this appeal, we must assume their delivery to have been Hubbell's act.

The purpose of their execution and delivery is shown by the tripartite agreement executed by and between the surviving assignees and Taylor and Hubbell.

This agreement looked to the settlement of the several estates and the discharge of the assignees, and to accomplish

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that object Hubbell professed to have procured, or to be able to procure, releases to said assignees from all outstanding creditors of the joint estate and from his individual estate, except four, one of whom was the oil company, and it was therein expressly stated that the four excepted claims were to remain outstanding. Such agreement between them provided that a certain claim against the United States, arising out of the destruction of a ship by the Confederate cruiser *Alabama*, was not a part of the joint estate assigned, but belonged to Taylor and Hubbell individually, and other claims, with the consent of Taylor, were to be assigned to Hubbell to enable him to procure releases from creditors of the joint estate.

Pursuant to this agreement, the two releases in question were delivered by Hubbell, and he must be held to be bound by the express stipulation that the oil company's claim was to remain outstanding against him, and that so far as the release to Taylor was concerned, it expressly limited its operation to Taylor, and was intended to discharge him alone.

In other words, he must be deemed to have consented to the latter provision.

In *Rogers v. Hosack* (18 Wend. 336), Judge COWEN said, in speaking of the rule that the release of one of two joint debtors operates to discharge both: "The rule has generally, if not universally, been applied to cases where such co-debtors were released without the consent of the other. * * * The release is like the leaving off of the seal from a bond which subverts the whole contract. * * * But the case is different when the alteration is by the consent of all the parties, accompanied with an intention that those only should be discharged whose names or seals are torn off in the case supposed, or who are released as in the case at bar."

After discussing the facts of the case before him, he reaches the conclusion that the debtor, who claimed the benefit of the strict rule, intended to remain liable, and said: "Upon principle there is nothing to prevent such an agreement."

To the same effect is *Burson v. Kincaid* (3 Penn. 57).

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Upon the assumption, therefore, that the judgment against Taylor and Hubbell was joint, our conclusion is that Hubbell was not discharged by the release of January, 1874.

But the conclusive fact in this connection is that no joint judgment ever was entered against Taylor and Hubbell. The whole of the appellant's argument is built upon the assumption that such a judgment existed, and his effort has been to convince us, that although the judgment was not joint in form, yet it must and should be so treated by the court on this appeal.

Having exhausted all the remedies possible in an ineffective effort to correct the judgment and make it joint, he asks this court to so regard it, for the purposes of enabling him to invoke the aid of a harsh and technical rule of law, to discharge him from an obligation towards the payment of which it does not appear that he has ever contributed a cent.

To do so would manifestly subvert and overthrow the intention of the parties in their various complicated dealings had in the settlement of the several estates. They had a right to contract upon the faith of the record as it stood, and it is not unreasonable to assume that if the judgment had been joint in form the result sought would have been reached in another way, and the case not embarrassed with the questions that have arisen upon the several assignments and releases that have been executed.

The fact that is prominent all through the negotiations is that the oil company never intended to release its claim against Hubbell, and Hubbell was well aware of that fact.

The other ground for the judgment sought rests wholly upon the question whether Mr. Lord had authority to execute and deliver the release given to Hubbell.

The trial court found that such instrument was executed without any power or authority, and as to the oil company's claim was wholly inoperative and void.

It may be conceded that the assignment of October 6, 1874, was intended to relate back to and have effect as of a date prior to the execution of the release.

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By the terms of the instrument of August, 1872, the oil company assigned only its claim against Taylor individually, and against his individual estate in the hands of the assignee.

By the instrument of October, 1874, it assigned its claim against the joint property of Taylor and Hubbell. In both, it expressly reserved its claim against Hubbell individually.

This was in entire harmony with the tripartite agreement which recited the fact that the assignees had never realized anything from Hubbell's individual estate and which contemplated the discharge of the assignees by the creditors, but that the oil company should retain its claim against Hubbell.

The legal conclusion which the appellant asked the court to draw from the two assignments was that they were ineffectual to divide the claim and carried to the assignee the right to collect the whole judgment.

That is, that although the assignor intended to sell and the assignee to buy but a part or share of the claim and clearly expressed such intent in the deed of assignment, the law gives to the instrument an entirely different effect and transfers what neither intended should pass by it.

I know of no principle of law that works such a result, and no authority is cited to sustain it.

The authorities that are cited hold simply that a creditor cannot split up a single cause of action without the consent of the debtor.

The reason for this rule is that to permit a cause of action to be divided would subject the debtor to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract and to decline any assignment by which it may be broken into fragments. (*Mandeville v. Welch*, 5 Wheat. 277.)

But the rule goes only to the right to sue as assignee of a part of a single cause of action.

It does not deny the right to sell and transfer an undivided part of a demand. And if all the owners unite in a suit upon it, the fact of the assignment of a part constitutes no defense.

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We need not consider in this case what title or authority Mr. Lord acquired under the assignment to him or what would have been the effect on the claim if Taylor or the assignee had paid it in full to Lord. No such question arises.

The only pertinent inquiry is did Lord under the assignment of the demand against Taylor acquire power to release Hubbell.

That inquiry was properly answered at the trial and there was no error in the refusal to find the request I have quoted.

If the assignment was ineffectual to divide the claim the title remained in the oil company.

But as the judgments were several and not joint, and no question of payment by either debtor arises, it is not perceived why the judgment against Taylor could not be separately assigned. No one was prejudiced by such a transaction, and the rights of the debtors between themselves remain unimpaired and unaffected.

The claim that Mr. Lord incurred some liability to Hubbell in case the release was ineffectual to discharge him is not available on this appeal. No motion was made to amend the complaint, except in respect to the demand for judgment. The claim against Lord could not stand upon the allegation of the complaint and the court properly denied the motion to amend.

The judgment should be affirmed.

All concur, except PARKER, J., not sitting.

Judgment affirmed.

MICHAEL LENNON, Appellant, v. MARY F. C. SMITH, Impleaded,
etc., Respondent.

Plaintiff contracted to perform certain work for defendant, and to finish the same at a time specified. The contract fixed a sum as damages for each day the work remained unfinished beyond that specified. In an action upon the contract it appeared that there had been a substantial breach of the contract on plaintiff's part, such as to entitle defendant to be relieved from its obligations. *Held*, the latter could not repudiate the contract for the purpose of barring plaintiff's claim for his work,

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and at the same time seek to make it effectual for the recovery of damages for its breach; and as it appeared that the amount of work done by plaintiff exceeded the amount of damages, that a judgment dismissing the complaint and awarding defendant the full amount of damages was error.

It seems that if it had appeared that the damages exceeded the price or value of the work done by plaintiff, defendant would have been entitled to judgment for the excess.

(Argued March 16, 1891; decided April 14, 1891.)

APPEAL from judgment of the General Term of the Court of Common Pleas of the city of New York, entered upon an order made May 23, 1888, which affirmed a judgment in favor of defendant entered upon the report of a referee.

This action was brought upon a contract between the parties, whereby the plaintiff agreed to furnish the labor and materials and build and complete a cellar upon the plaintiff's premises at the price of thirty-five cents per cubic yard for excavation, and sixteen cents per cubic yard for walls, to be paid upon the order of the architect on completion. The contract contained this provision: "A penalty of twenty dollars to be enforced for each and every day that the work remains unfinished beyond the term" mentioned.

The referee found that the plaintiff abandoned the work before completion, and that the cellar was not so completed and ready for the framers to proceed until the expiration of twenty-seven days after the time specified for completing the work; and as conclusion of law determined that the twenty dollars per day provided for by the contract were liquidated damages, and directed judgment of dismissal of the complaint, and for \$540 damages in favor of defendant.

E. T. Wood for appellant. The contract being substantially complied with, the plaintiff is entitled to recover without the certificate of the architect; the absence of a certificate is not fatal, and it may be supplied by other evidence. (*Doyle v. Halpin*, 1 J. & S. 252; *Thomas v. Fleury*, 26 N. Y. 26; *Woodward v. Fuller*, 80 id. 312; *Nolan v. Whitney*, 88 id. 648; *Loeffler v.*

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Froelich, 35 Hun, 368; 11 Abb. [N. S.] 378; *Weeks v. McCarthy*, 47 N. Y. Supp. 1.) The referee erred in his finding as a conclusion of law that the absence of an architect's certificate was fatal unless fraudulently withheld. (*Doyle v. Halpin*, 1 J. & S. 252; *Thomas v. Fleury*, 26 N. Y. 26; *Woodward v. Fuller*, 80 id. 648; *Loeffler v. Froelich*, 35 Hun, 368; *Weeks v. McCarthy*, 47 N. Y. Supp. 1.) Plaintiff may be excused from completing the contract within the time limited, by acts on the part of the defendant preventing the completion. (*Stewart v. Keteltas*, 36 N. Y. 388; *Weeks v. Little*, 89 id. 566; Hoyt's Mechanics' Lien Law, 41-45.) The defendant had elected to rely upon the penalty alone for non-performance, if any, as to time, and to go on and complete the work. The defendant could not have both. When she agreed to and did employ another to finish the work, she elected to waive the penalty, not to rely upon it. (*Wheeler v. Scofield*, 67 N. Y. 311.) But if plaintiff omitted any work called for by the contract which did not interfere with its general scope and which defendant could easily have supplied, nevertheless, under the decisions, he is entitled to recover on a *quantum meruit* if there has not been such a failure in the performance of the contract as to defeat the object and intention of the parties. (*Glacius v. Black*, 50 N. Y. 145; *Goodward v. Fuller*, 80 id. 312; *Heckman v. Pinkney*, 81 id. 211.) Where a sum per diem is given as liquidated damages for non-completion of contract by the contractor, and the defendant, not choosing to rely thereon for his security, proceeds to finish the work, he must be held to have waived the penalty which was imposed for the failure to complete the building in time. (*Murphy v. Buckman*, 66 N. Y. 297, 300; *Gillen v. Hubbard*, 2 Hilt. 303; Bigelow on Estoppel, 50.)

Frank E. Smith for respondent. The report of the referee is conclusive as to the facts. (*Stilwell v. M. L. Ins. Co.*, 72 N. Y. 385.) No questions of law arise under any of the exceptions taken to the findings of fact made by the referee. (*Flack v. Village of Green Island*, 33 N. Y. S. R. 339-342;

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Healy v. Clark, 120 N. Y. 642; *N. E. I. Co. v. G. E. R. R. Co.*, 91 id. 153; *Haag v. Hillemeier*, 120 id. 651.) Plaintiff, not having performed the work which, by his contract, he undertook to do, can recover nothing. (*Smith v. Brady*, 17 N. Y. 173; *Glacrus v. Black*, 50 id. 145; *Woodward v. Fuller*, 80 id. 312; *Nolan v. Whitney*, 88 id. 648; *Schenke v. Rowell*, 3 Abb. [N. C.] 42.) The plaintiff, having willfully refused to perform a part of the work required by the contract, can recover nothing. (*Crane v. Knubel*, 61 N. Y. 645.) The failure to procure the certificate of the architect was also fatal to any recovery by plaintiff. (*Doll v. Noble*, 116 N. Y. 230; *Barton v. Herman*, 11 Abb. [N. S.] 378; *Smith v. Wright*, 6 T. & C. 694; *Guilet v. Mayor, etc.*, 4 J. & S. 557; *Cross v. Belknap*, 24 Wkly. Dig. 256.) The money judgment awarded to defendant under the counter-claim is correct. (1 *Sutherland on Dam.* 512, 520; *Cotheal v. Talmadge*, 9 N. Y. 551; *O'Donnell v. Rosenberg*, 14 Abb. [N. S.] 59; *Pettis v. Bloomer*, 21 How. Pr. 317; *Farnham v. Ross*, 2 Hall, 167; *Pollock on Cont.* 467; *Noyes v. Phillips*, 60 N. Y. 408; *Sainlis v. Ferguson*, 7 C. B. 716.)

BRADLEY, J. The plaintiff entered upon the performance of the work. And whether or not he substantially performed it depended upon other facts which the referee found against the plaintiff. There were several controverted questions of fact, which it is unnecessary to specifically mention here, since there was evidence to support the facts as found by the referee; and upon them the conclusion was warranted that there was a substantial breach of the contract on the part of the plaintiff available to defeat a recovery by him. (*Smith v. Brady*, 17 N. Y. 173.) But having determined that the defendant was entitled to relief from the obligation of her contract by the breach of it by the plaintiff, and having for that reason wholly relieved her from it accordingly, it is difficult to see how the referee could properly have awarded damages in her favor against the plaintiff for the non-performance of the contract. She could not repudiate the contract for the purpose of barring

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the plaintiff's claim for his work, and at the same time make it effectual for the recovery of damages against him for its breach, although she might, if the facts permitted recover damages, if any there were, in excess of the price or value of the plaintiff's work. And the reason is that in such case the contract is permitted to remain operative for the purpose of the remedy and relief of both parties to it, and it is no less essential to support the defendant's claim for damages than it is to sustain that of the plaintiff founded upon it for his work. It is apparent that a rule having the effect to give one of the parties to a contract the benefit of it to the exclusion of the other in the same action, would or might work very unjustly to the latter and quite unreasonably to the profit of the former. (*Walker v. Millard*, 29 N. Y. 375; *Woodward v. Fuller*, 80 id. 312.) In the present case the conclusion was warranted by the evidence that the work performed by the defendant at the contract prices amounted to more than the damages recovered by the defendant. The effect of the recovery directed by the referee was to give the defendant the benefit, such as it was, of all the work performed by the plaintiff and, in addition, the damages awarded to her against him. This was justified by no sound principle of law. The conclusion of law was based upon the fact found that the work which the plaintiff undertook by the contract to do, was not substantially performed by him, not that his work was of no value to the defendant.

The view thus taken renders the consideration of any other question unnecessary.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

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EDGAR D. CROWNINSHIELD, as Supervisor, etc., v. THE BOARD
OF SUPERVISORS OF THE COUNTY OF CAYUGA.

A town, by bonding itself in accordance with the statute, and causing a railroad to be built, creates a new and additional property, which becomes the subject of taxation; the remainder of the county is, for the time being, deprived of the benefit to be derived from the taxation thereof, so that the town may reap the benefits by having the taxes applied in satisfaction of its bonded indebtedness; and thus the sinking fund provided for by the statutes (Chap. 907, Laws of 1869, as amended) is, up to the time the bonds become due and payable, a fund the town has an absolute right to have applied in payment of its bonds.

In 1871 the town of I. pursuant to the provisions of the act of 1866 (Chap. 433, Laws of 1866), issued its bonds in aid of the construction of a railroad through the town. The state and county taxes collected from the railroad company upon the assessed valuation of its property in the town from the years 1872 to 1887 were paid over to the county treasurer, who used them in the payment of state taxes and county indebtedness, and no money was set apart by him as a sinking fund to pay the bonds so issued. The town taxes so assessed and collected were paid over to the supervisor of the town and used by him in paying town expenses. Said bonds were paid by the town from moneys raised by general tax on property in the town, including that of the railroad company. Upon a case submitted under the Code of Civil Procedure (§ 1279), *held*, that the town was entitled to recover of the county the amount of the state and county taxes so paid to the county treasurer within six years prior to the submission; and that the failure of the town to pay over the amount of town taxes collected from the railroad company did not establish a waiver or constitute an estoppel.

Also *held*, that the county was not entitled to have the stock of the railroad company, received by the town in exchange for its bonds, sold and the proceeds applied in payment of said bonds; that the town had the absolute right to have the sinking fund provided for by law applied in payment of the bonds without regard to the stock.

(Argued March 17, 1891; decided April 14, 1891.)

CROSS-APPEALS from a judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 1, 1889, which ordered a judgment in favor of plaintiff upon a case submitted pursuant to section 1279 of the Code of Civil Procedure.

The facts, so far as material, are stated in the opinion.

124	583
124	676
124	588
134	389
124	583
138	407
124	588
155	108

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A. P. Rich for plaintiff. The fact that the town taxes collected of the railroad company were not paid to the county treasurer, for the purpose of providing a sinking fund, did not exonerate the county from contributing the county and state taxes collected to a sinking fund for the redemption of the bonded indebtedness of the town. (*Newman v. Bd. Suprs.*, 45 N. Y. 684; *Lounsberry v. Depew*, 28 Barb. 44; *Twinam v. Swart*, 4 Lans. 263; 6 Wait's Act. & Def. 679; *Hand v. Bd. Suprs.*, 31 Hun, 531.) The town of Ira has not ignored the statutory scheme provided for the payment of its bonds, nor waived any rights entitling it to recover of the county the state and county taxes. (Laws of 1869, chap. 907, § 4; Laws of 1871, chap. 283, § 4.) The plaintiff is not prejudiced at all in its right to recover of the county as for money had and received, because it did not sell its stock in the railroad company and apply the proceeds towards the payment or redemption of the bonds. (Laws of 1866, chap. 433, § 2; Laws of 1869, chap. 907, § 4; *Clark v. Sheldon*, 106 N. Y. 110; *Vandenburg v. Vil. of Greenbush*, 66 id. 1; *Whipple v. Christian*, 80 id. 523; *Strough v. Suprs.*, 119 id. 212.) The judgment of the General Term relative to the taxes collected of the railroad company in the year 1888, was correct and should be affirmed. (Laws of 1869, chap. 907, § 4.) The town of Ira waived no remedy nor lost no rights, by the acts of its supervisor sitting as a member of the board of supervisors of the county. (*Newman v. Bd. Suprs.*, 45 N. Y. 676; *Strough v. Bd. Suprs.*, 119 id. 212.)

Wm. B. Woodin for defendants. The moneys commanded by the statute to be paid into the sinking fund, could not lawfully be diverted by the town to the payment of the interest upon the bonded indebtedness of the town. The sinking fund was inviolate, and was to be held for the redemption of the town bonds and for no other purpose. (*Clark v. Sheldon*, 106 N. Y. 110.) The county of Cayuga had a right to share in all the benefits and advantages which might have resulted from a strict and faithful observance by the town of Ira of

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the requirements of the statute under consideration, in regard to the sinking fund to be created, including its management, the purchase of the town bonds below par, investment, etc., of which it was deprived by the plaintiff. (1 Addison on Cont. 7, 8.) The town of Ira waived the statutory scheme provided for its own benefit, no taxpayer objecting, and having done so, and having otherwise provided for the payment of its bonded indebtedness, it cannot now enforce observance of the statutory methods for providing a sinking fund, nor maintain an action as for money had and received. (Laws of 1869, chap. 907, § 6.) A party may waive a right in his favor created by statute the same as any other. (*In re Cooper*, 97 N. Y. 507; *Tombs v. R. & S. R. R. Co.*, 18 Barb. 583; *Buel v. Town of Lockport*, 3 N. Y. 197; *Allen v. Comrs. of Land Office*, 38 id. 312; *Duryee v. Mayor, etc.*, 96 id. 477; *People ex rel. v. Zoll*, 97 id. 203; *Hilton v. Fonda*, 86 id. 339; *Brink v. H. F. Ins. Co.*, 80 id. 108.)

HAIGHT, J. The facts agreed upon herein are substantially as follows:

On the 1st day of March, 1871, the town of Ira, pursuant to the provisions of chapter 433 of the Laws of 1866, and the several acts amendatory thereof, issued its bonds to the amount of \$40,000 in aid of the construction of the Southern Central Railroad. Subsequently, and from time to time thereafter, payments were made by the town upon such bonded indebtedness until the 1st day of March, 1888, at which time such indebtedness was fully paid and the bonds were surrendered and canceled. The moneys with which such payments were made were raised by a general tax on real and personal property liable to taxation in the town of Ira, including the real and personal property therein owned by the Southern Central Railroad Company. The state, county and town taxes, exclusive of school and road taxes, collected from the said Southern Central Railroad Company upon the assessed valuation of its real and personal property in the town of Ira, in the years 1872 to 1887 inclusive, were in amount as follows: State

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taxes, \$934.24; county taxes, \$977.81; town taxes, \$3,572.90. The state and county taxes in each year were paid over to the treasurer of the county by the town collector, and the same were used by him in the payment of the state taxes and the ordinary expenses and obligations of the county. The town taxes so collected were by the collector paid over to the supervisor of the town and were by him used and expended in payment of the ordinary and current expenses of the town. No money was ever set apart by the treasurer of the county as a sinking fund with which to pay off and retire the bonds so issued by the town of Ira, as required by chapter 907 of the Laws of 1869 and the several acts amendatory thereof. The plaintiff seeks to recover the amount of state and county taxes collected from such railroad company in the town of Ira during the years named which were paid over to the treasurer of the county and used by him as aforesaid. The General Term awarded judgment in favor of the plaintiff for the amount of the county taxes, with the interest accrued thereon, collected and paid over to the treasurer of the county within the six years prior to the submission of this controversy, and refused to award judgment to the plaintiff for the amount of such state taxes.

It is now contended on behalf of the defendant that the diversion by the town of Ira of the town taxes collected in each year from the railroad company exonerated the defendant and its treasurer from any obligation or duty to contribute the county and state taxes thus collected to a sinking fund for the redemption of the bonded indebtedness of the town; that such diversion by the town was unlawful; that it deprived the county of its right to share in the benefits and advantages which might have resulted from a strict and faithful observance of the statute by the town in regard to the sinking fund, and that it consequently amounted to a waiver on the part of the town of the statutory scheme provided for the payment of its bonded indebtedness.

The answer to this contention is, that the facts do not establish a waiver on the part of the town or constitute an estoppel;

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that a duty was imposed upon the county treasurer to invest, as a sinking fund, for the purpose named, the state and county taxes that came into his hands for that purpose, and that it is not apparent that the county has suffered by reason of any failure on the part of the town or its officers to pay over to the treasurer the amount collected of the railroad company for town purposes. The theory upon which the plaintiff seeks to recover of the defendant is that it has diverted and converted to its own use the moneys collected and held by the treasurer for the sole purpose of paying and retiring the bonds issued by the town. It is insisted that if the town taxes had been paid over to the treasurer and had been by him invested, that he might have been able, through his management of the fund, to purchase the bonds below par, and thus sooner pay off and retire them; but the amount of such town taxes, as we have seen, were but \$3,572.90, and there was no investment thereof that the treasurer could make which was authorized by the statute which would produce a greater income thereon than the interest allowed by law, the amount of which would not have been sufficient to pay the bonds or any considerable portion thereof before they matured and were in fact paid and retired by the town. The facts agreed upon make no mention of any time in which the bonds in question could have been purchased at any sum below par, and we cannot assume such fact to have existed for the purpose of reversing a judgment.

It is conceded in the briefs of counsel for the respective parties that the stock of the railroad company subscribed for by the town, upon the issuing of its bonds, still remains in the possession of the town, and has not been sold, and, it is claimed on behalf of the county, that it had the right to have this stock sold and the proceeds applied in the payment of the bonds in accordance with the provisions of the act of 1869 referred to, as amended by chapter 283 of the Laws of 1871.

We hardly think it necessary at this time to enter upon an extended consideration of these acts, for the reason that they have already been considered and construed by the Court of

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Appeals in former cases; and, as we understand those cases, they were disposed of upon the theory that the acts in question do not impose a tax or burden upon the other towns of the county; that a town, by bonding itself and causing a railroad to be built, created a new and additional property, which became the subject of taxation; that the rest of the county was simply deprived of the benefits to be derived for the time being of the taxation of such property, so that the town might reap the benefits of the taxes collected thereon by having the same applied in the satisfaction of its bonded indebtedness; the result of which was to make the sinking fund provided for in the act, up to the time that the bonds matured and became due and payable, a fund which the town had the absolute right to have applied in the payment of the bonds without regard to the stock. (*In re Clark v. Sheldon*, 106 N. Y. 104-111; *Bridges v. Board of Supervisors of Sullivan County*, 92 id. 570-579.)

As to the appeal by the plaintiff, it distinctly appears in the facts agreed upon that the state and county taxes were diverted and paid out for state and county purposes. We, therefore, cannot assume that it remained in the general fund of the county, as was the case in *In re Spaulding v. Arnold* (34 N. Y. St. Rep. 980; 125 N. Y. 194), but the plaintiff should have been awarded judgment for the amount of the state taxes collected and appropriated within six years prior to the submission. (*Strough v. Board of Supervisors of Jefferson County*, 119 N. Y. 212-218.)

The judgment of the General Term should be modified by adding to the recovery against the defendant the sum of \$361.91, together with \$71.54 interest thereon to the 18th day of December, 1888, together with interest thereon from that date to the date of the entry of the judgment, and, as so modified, the judgment should be affirmed, with costs to the plaintiff.

All concur.

Judgment affirmed.

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CONSTANCE B. PRICE, Appellant, v. WALTER J. PRICE et al.,
Respondents.

Where a marriage has been annulled by judicial decree, upon the ground that when it was contracted the husband had a former wife living, who had absented herself for more than five successive years immediately preceding the second marriage, without being known by him to be living, although until it was so annulled it was voidable only and not void (2 R. S. 139, § 6), and the cohabitation of the parties was not adulterous, and although both parties entered into the marriage in entire good faith, yet the wife is not entitled to dower in the real estate owned by the husband at the date of the decree.

Wait v. Wait (4 N. Y. 95); *Jones v. Zoller* (29 Hun, 551; 32 id. 280; 37 id. 228; 104 N. Y. 418); *Brower v. Bowers* (1 Abb. Ct. App. Dec. 214); *Griffin v. Banks* (37 N. Y. 621), distinguished.

Price v. Price (33 Hun, 76), reversed.

(Argued March 3, 1891; decided April 21, 1891.)

CROSS-APPEALS from judgment of the General Term of the Supreme Court in the first judicial department entered upon an order made November 7, 1889, which modified, and affirmed as modified, a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

April 23, 1839, Walter W. Price and Susanna Butler intermarried in England and lived together as husband and wife at Birmingham for about one year, when he came to the United States, where he resided until his death.

July 1, 1865, Price and Constance Bridget Tallon, the plaintiff in this action, intermarried at the city of New York, and lived together as husband and wife until July, 1871, having two children born unto them, who survive.

In May, 1873, Price began an action in the Supreme Court of this state to have his last marriage annulled on the ground that his first wife was then living, which resulted in a judgment entered April 15, 1874, annulling the marriage. The court found that the first wife, Susanna, had absented herself from her husband since 1843 — had not been heard of by him for more than five years, and that the marriage between Walter

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W. Price and Constance B. Tallon was contracted in good faith, believing that the former wife was dead. It was adjudged that their marriage was null and void, but "only from the time that its nullity is hereby pronounced, to wit, from and after the date of this judgment." It was further adjudged that the children of the marriage were legitimate, and entitled to succeed in the same manner as legitimate children to the real and personal estate of the father and mother, or either of them. At the date of the entry of this judgment, Walter W. Price owned the real estate described in the interlocutory judgment in this action, about fourteen acres of which he conveyed, in July, 1875, to Walter J. Price. June 6, 1876, Walter W. Price died seized of all of said real estate except that so conveyed, which he disposed of by will. This action was begun by the plaintiff June 7, 1880, to have dower admeasured in the real estate of which Walter W. Price was seized at the date of the entry of the judgment annulling the marriage. The defendants are the devisees, grantees and mortgagees of the devisees of Walter W. Price. They set up in their answers, among other defenses: (1) That the marriage was null and void and had been so adjudged. (2) That, February 25, 1874, the plaintiff received from Walter W. Price a sum of money in satisfaction of all claims to dower in his property.

Chas. Jones and George H. Starr for plaintiff. The plaintiff was entitled to recover on the facts proved by her when she rested her case. (3 Kent's Comm. 368.) During the lawful connection between the parties, the husband, Walter W. Price, was seized of the lands in which the plaintiff claims dower, and the right attached before the entry of the judgment declaring the marriage void. (4 Kent's Comm. 50.) The marriage between the plaintiff and Walter W. Price was, on the facts found by the referee, a valid marriage. (2 R. S. 139, §§ 5, 6, 8, 9; *Valleau v. Valleau*, 6 Paige, 207; *White v. Lowe*, 1 Redf. 376; *Cropsey v. McKinney*, 30 Barb. 47; *Griffin v. Banks*, 24 How. Pr. 213; *Roderigas v. E. R. S. Inst.*, 63 N. Y. 460; *Brower v. Roberts*, 1 Abb. Ct. App. Dec.

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214; *Jones v. Zoller*, 29 Hun, 551; 32 id. 280; *Price v. Price*, 33 id. 76; *Jones v. Fleming*, 37 id. 227.) The marriage of the plaintiff with Walter W. Price being valid, and she being his lawful wife, had dowable capacity, and her dower right or title was an interest which attached on the land of which her husband was seized during the coverture. (*Wait v. Wait*, 4 N. Y. 95; *Steele v. Ward*, 30 Hun, 557.) The plaintiff has never been barred or divested of the dower right or interest which attached to the lands by virtue of marriage and seisin. (*Wait v. Wait*, 4 N. Y. 95; *People v. Faber*, 92 id. 149; *Scheffer v. Pruders*, 64 id. 47.) The plaintiff was the lawful wife of Walter W. Price, and as such had dowable capacity. Her right to dower has not been cut off or barred. (2 R. S. 139, § 6; *Brower v. Brower*, 1 Abb. Ct. App. Dec. 225.) As the defendant Paine, who owns the manor property, is not a residuary devisee, the rule which permits the whole dower to be allotted out of one parcel, when that parcel is part of the residuary estate, does not apply. (*Funyan v. Runyan*, 21 Hun, 12; *Burnhart v. Lymburner*, 85 N. Y. 172.) The court below erred in refusing to reconsider the question and direct dower to be allotted or charged as an annuity upon the several properties. (*Raynor v. Raynor*, 94 N. Y. 248; *Weeks v. Cornell*, 98 id. 657.) By the express terms of the statute the defendant is liable for all damages resulting to the plaintiff from the time of demand till the time of recovery of judgment. (Code Civ. Pro. § 1600; 2 R. S. [6th ed.] 1122, § 20; *Kyle v. Kyle*, 67 N. Y. 405.) The statute making the defendant who refuses the demand the only person liable for the damages, is evidently based upon well-settled principles of equity. (*Youngs v. Carter*, 10 Hun, 198, 199; *B. N. Bank v. Duncan*, 12 id. 410; 38 id. 564.) The Code of Civil Procedure prescribes a special rule as to damages in dower cases. It is distinct from the rule in ejectment cases. (*Jackson v. Wood*, 24 Wend. 443; *Kyle v. Kyle*, 67 N. Y. 406, 407; *Lawrence v. Miller*, 2 id. 245; *Aikman v. Harsell*, 98 id. 191; *Morgan v. Varick*, 8 Wend. 587; *Jackson v. Wood*, 24 id. 443; *Leland v. Tousey*, 6 Hill,

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328; *Holmes v. Davis*, 19 N. Y. 441, 443; *Budd v. Walker*, 9 Barb. 493; *Grant v. Cooper*, 9 Hun, 329.) The general ground of defendants' appeal as to damages is erroneous. (2 R. S. [6th ed.] 1122, 1123, § 20; *Aikman v. Harsell*, 31 Hun, 634; *Schroder v. Mayor, etc.*, 36 id. 423; *Lautz v. Buckingham*, 4 Lans. 484; *Thompson v. Hickey*, 8 Abb. [N. C.] 159; 59 How. Pr. 434; *In re B. P. Church*, 3 Edw. Ch. 155, 169, 170; 4 Bradf. 503, 515.) In so far as any question can be raised in respect to the order of the General Term denying defendants' motion for a reargument or for a modification of the order of reversal, it is sufficient to say that the application was addressed to the discretion of the court, and the order is not reviewable in this court. (*Marshall v. Davies*, 78 N. Y. 414; *Agate v. Morrison*, 84 id. 673.) The only issues which the court below could consider in determining the appeal, or which can be considered here, are the issues which appear by the record to have been tried. All other issues, whether presented by the pleadings or not, are deemed to have been abandoned or waived. When a party has elected to try, or has acquiesced in the trial of the action upon a particular theory, he is concluded, and the appellate court will only consider questions raised on the issues as tried. (*Lockwood v. Quackenbush*, 83 N. Y. 607.) The facts which the defendants say they wish to prove on another trial are immaterial, and if admitted would not be a bar to the plaintiff's right of dower. (*Carson v. Murray*, 3 Paige, 483.)

David Wilcox for defendants Paine and others. Plaintiff's contention that notwithstanding judgment of nullity, the marriage is valid up to the date of such judgment, is in derogation of the general common-law and statutory rules, and rests wholly upon the claim that this is the effect of an exception expressed in the statute, that by virtue thereof a judgment of nullity does not annul but merely terminates the marriage. (*Williamson v. Parisien*, 1 Johns. Ch. 389; *Finn v. Finn*, 62 How. Pr. 83; *Elliott v. Gurr*, 2 Phil. 16; *Blossom v. Barrett*, 37 N. Y. 434; *Appleton v. Warner*, 51 Barb. 270.) The excep-

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tion upon which the plaintiff relies was introduced merely for the purpose of rendering the marriages to which it applies voidable; it is common to all marriages of that character, and if plaintiff's claim be well founded it must be held that all such marriages are not annulled, but merely terminated by judgment of nullity. (*Jaques v. Pub. Admr.*, 1 Bradf. 499; *Finn v. Finn*, 62 How. Pr. 86; *Henry v. Henry*, 4 Den. 253; *Valleau v. Valleau*, 6 Paige, 207; *Cropsey v. McKinney*, 30 Barb. 47, 55; *White v. Lowe*, 1 Redf. 376.) It is impossible that a contract attempted by persons who were incapable of contracting, and for that reason adjudged null, can nevertheless be a valid contract. (*Valleau v. Valleau*, 6 Paige, 207; *White v. Lowe*, 1 Redf. 376.) Other provisions of the statute show that, after it has been adjudged null, the attempted marriage has no validity whatever. (Laws of 1855, chap. 547, § 1; Laws of 1882, chap. 401.) Without qualification of any sort, the statute expressly provides that the judgment of nullity shall be evidence of the invalidity of the marriage, and this court has several times stated that such is its effect. (*Keen's Case*, 7 Cook, 140; *Aughtie v. Aughtie*, 1 Phil. 201; *Elliott v. Gurr*, 2 id. 16; *Perry v. Perry*, 2 Paige, 507; *Wait v. Wait*, 4 N. Y. 100; *In re Ensign*, 103 id. 287; *Van Cleaf v. Burns*, 118 id. 549.) The claim that dower arises from a marriage which is void, whether by reason of the statute alone or by reason of a judgment pronounced in accordance with statutory provisions, is contrary to the authorities. (*Cropsey v. Ogden*, 11 N. Y. 228; Bishop on Mar. & Div. § 706; Park on Dower, 19; 2 Bishop on Mar. & Div. § 690; 1 Scribner on Dower, 146; *Spicer v. Spicer*, 16 Abb. Pr. [N. S.] 112.) The case upon which the General Term rested its decision does not support the same. That case and the decisions since, so far as applicable here, support the rules already stated. (*In re Ensign*, 103 N. Y. 284; *Day v. West*, 2 Edwards, 596; *Reynolds v. Reynolds*, 24 Wend. 193; *Cherraud v. Cherraud*, 1 Leg. Obs. 134; *Moore v. Hageman*, 92 N. Y. 521; *Witthans v. Smith*, 105 id. 332.) The judgment of the General Term was erroneous in that it did not order a new trial. (*Jones v.*

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Fleming, 104 N. Y. 418; *Griffin v. Marquardt*, 17 id. 28; *Foot v. A. Co.*, 61 id. 571; *Ehrichs v. De Mill*, 75 id. 370; *Guernsey v. Moore*, 80 id. 181; *Gawthrop v. Leary*, 89 id. 622; *Goodwin v. Conklin*, 85 id. 21.) It was error to charge the defendant Little with damages. (1 R. S. 742, §§ 19, 20, 22, 23; *Kyle v. Kyle*, 67 N. Y. 400, 405; Code Civ. Pro. § 1603, *Hazen v. Thurber*, 4 Johns. Ch. 604; *Witthans v. Schack*, 38 Hun, 560; *Raynor v. Raynor*, 21 id. 36.) There is no merit in the appeal regarding the manner in which dower has been assigned. (Code Civ. Pro. § 1609; *White v. Story*, 2 Hill, 543; *Coates v. Cheever*, 1 Cow. 460; *Wood v. Keyes*, 6 Paige, 478; *Raynor v. Raynor*, 21 Hun, 42.) There can be no dower in the burial lots in Greenwood cemetery. (Laws of 1838, chap. 298; Laws of 1839, chap. 156; Laws of 1850, chap. 152; *Thompson v. Hickey*, 59 How. Pr. 434; *Schroeder v. Winzoe*, 36 Hun, 424; *Lautz v. Buckingham*, 4 Lans. 484.)

James R. Marvin for defendant Little. Plaintiff's marriage was invalid. (2 R. S. [5th ed.] 227, 233, 235, §§ 4, 33, 36, 50; Code Civ. Pro. § 174.) A divorce at common law avoided the marriage *ab initio*. It was equivalent to a sentence of nullity under our statute. It placed the parties in the same relation to each other as though there had been no marriage. (*Wait v. Wait*, 4 N. Y. 100; 2 Kent's Comm. 78, 80; 1 Johns. Ch. 389; 4 Johns. 52.) The marriage in question was never valid for any purpose. The most that can be claimed for it is, that if it had not been annulled during the life-time of Price, at the instance of one of the parties, or afterwards at the instance of the former wife, the plaintiff might have been entitled to dower and the issue of the marriage might have been "entitled to succeed in the same manner as legitimate children to the real and personal estate of the parent who, at the time of the marriage, was competent to contract." (2 R. S. [5th ed.] 234, § 37; *Wait v. Wait*, 4 N. Y. 95.) The marriage in question was void at common law, voidable only by statute from the sentence of nullity, and from that time must be considered as an absolutely void marriage. By the decree

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annulling the marriage, the marriage became absolutely void *ab initio*, and the inchoate right of dower, if it ever attached, was absolutely destroyed. (*Spicer v. Spicer*, 16 Abb. Pr. [N. S.] 112.) The court at Special Term properly overruled the referee in his findings of damages for mesne profits as against Mrs. Little from the time of the conveyance of her house to Wedekind. (*Graham v. Linden*, 50 N. Y. 551.) Mrs. Little in no event can be charged with the mesne profits after she conveyed the premises No. 4 Vannest place to Wedekind, April 25, 1882. After that time she ceased to have any interest in that property. (36 N. Y. 646; 60 Barb. 478; 19 N. Y. 488; 3 Black. Comm. 205.) The occupant of the premises subject to a right of dower is held for mesne profits on the theory that he has enjoyed the use of the property, either by occupation or through the receipt of rents. If he has received no rents or if occupation has not been beneficial to him no damages can be recovered. If Mrs. Little, while she owned the property, had not occupied the premises and had not been able to rent them, no damages could have been recovered against her. (*Witthans v. Schack*, 38 Hun, 560.) The Code of Civil Procedure makes provision for the recovery of mesne profits. (Code Civ. Pro. §§ 1600, 1601, 1602; *Kyle v. Kyle*, 67 N. Y. 406.) The purchase of Vannest place property by Mrs. Little was not an unlawful act, whether she had knowledge of plaintiff's dower claim or not. She is chargeable only for what has come to her hands. (*Van Name v. Van Name*, 23 How. Pr. 252; Code Civ. Pro. § 1600.) At common law a widow was entitled to damages for withholding her dower from the time only when she recovered her judgment for dower. (*Kyle v. Kyle*, 67 N. Y. 406, 407.) It was by statute that she first became entitled to arrears. The statute prescribed the sole rule for the amount thereof, both in law and equity. (Code Civ. Pro. §§ 1600, 1613; 1 R. S. 742, §§ 19, 20.) If Mrs. Little had continued the owner of the premises up to the application for judgment for damages, no recovery could be had against her except for six years immediately prior to such application. (*Kyle v. Kyle*, 67 N. Y. 405.)

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FOLLETT, Ch. J. The primary question underlying this case is whether, when a wife absents herself from her husband for five successive years without being known by him to be living within that time, and he contracts a second marriage which is annulled in an action between them because the first wife is living, such second wife is entitled to dower in the real estate owned by him at the date of the entry of the judgment of nullification?

In this state the right to dower arises out of the rules of the common law, except in so far as they have been changed by our statutes.

By the common and canon law a marriage by one having a spouse living and undivorced, though the spouse had been absent and believed to be dead, was void *ab initio*, and the person contracting a second marriage was guilty of a felony. (1 Scrib. Dow. 115, pp. 5; 1 Black. Com. 436; 2 Steph. Com. [11th ed.] 256; 2 Kent's Com. 79; 1 Bish. M. & D. § 299.)

An examination of the legislation on the subject of marriages between persons, one of whom has a spouse living, becomes necessary to enable us to determine whether the rule of the common law has been changed.

By chapter 2 of the first year of James the First, it was enacted that a person marrying a second time, whose husband or wife had been continually absent for seven years immediately preceding the second marriage and not known by such person to be living within that time, should not be guilty of bigamy. The rule prescribed by this statute has remained the law of England to this day. (4 Steph. Com. [11th ed.] 90.) A statute containing the same provisions, though reducing the period of absence to five years, was enacted in this state February 7, 1788 (2 J. & S. 214), which with slight modifications has been continued in force to the present time. (1 Rev. Acts of 1801, 122; 1 Rev. Laws of 1813, 112; 2 R. S. 687; Penal Code, §§ 298, 299.)

It was held in this state that the statute concerning bigamy did not render such a second marriage valid (*Fenton v. Reed*,

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4 Johns. 52; *Williamson v. Parisien*, 1 Johns. Ch. 389), and such is the rule in England. (Shelf. M. & D. 89, 223, 230, 479.)

Such was the condition of the law when the Revised Statutes of this state were enacted, and experience having proved that the statute in respect to bigamy had induced the contraction of second marriages by persons having spouses who had been absent for five years and believed to be dead, which after the return of the absent husband or wife, were found to be void and the issue illegitimate, it was, for the purpose of alleviating some of these consequences enacted. (2 R. S. 139.)

“§ 5. No second, or other subsequent, marriage, shall be contracted by any person during the life-time of any former husband or wife of such person, unless,” * * * and “Every marriage contract in violation of the provisions of this section, shall, except in the case provided for in the next section, be absolutely void.”

“§ 6. If any person whose husband or wife shall have absented himself or herself, for a space of five successive years, without being known to such person to be living during that time, shall marry during the life-time of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority.”

It was also provided (1 R. S. 142):

“§ 20. The chancellor (Supreme Court) may by a sentence of nullity, declare void the marriage contract for either of the following causes, existing at the time of the marriage
* * *

“2. That the former husband or wife of one of the parties was living; and that the marriage with such former husband and wife was then in force * * *.

“§ 23. When it shall appear and be so decreed, that such second marriage was contracted in good faith, and with the full belief of the parties, that the former husband or wife was dead, the issue of such marriage born or begotten before its nullity be declared, shall be entitled to succeed, in the same

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manner as legitimate children, to the real and personal estate of the parent who, at the time of the marriage was competent to contract; and the issue so entitled shall be specified in the sentence of nullity."

By these provisions such marriages ceased to be void, and became voidable and subject to be annulled, with the consequences incident to the annulment of marriages by the rules of the common law, except in so far as they were changed by the above sections and the two hereinafter quoted.

By the common law, neither dower nor courtesy arises from a voidable marriage, if it be annulled during the life-time of the parties, and when annulled by the judgment of a competent court, they are in the same situation in respect to each other, and to rights in the property of each other, as though a marriage had never been entered into, and the children born of it are illegitimate unless legitimated by statute. (*Aughtie v. Aughtie*, 1 Phill. 201; *Cage v. Acton*, 1 Ld. Raym. 521; Bish. on M. & D. §§ 116-118, 690, 712; Bish. on H. & W. §§ 247, 479, 482; 1 Bright H. & W. 7, 322; 2 id. 366; 1 Roper H. & W. 332; Stewart M. & D. §§ 147, 429, 437.)

And in the absence of a statute saving the right to dower, the dissolution *a vinculo* of a valid marriage, for the fault of either party, bars it. (*Barrett v. Failing*, 111 U. S. 523; *Frampton v. Stephens*, L. R. [21 Ch. Div.] 164; 14 Am. & Eng. Encly. Law, 537; 5 id. 921.)

It is contended by the learned counsel for the plaintiff that the rule of the common law was altered by the sections of the Revised Statutes hereinbefore set forth, and by the two next quoted, which are the only ones relied on as affecting a change.

"§ 8. In case of divorce, dissolving the marriage contract for the misconduct of the wife, she shall not be endowed." (1 R. S. 74, § 8.)

"§ 48. A wife being a defendant in a suit for a divorce brought by her husband, and convicted of adultery, shall not be entitled to dower in her husband's real estate, or any part thereof, nor to any distributive share in his personal estate." (2 R. S. 146, § 48.)

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The last section was repealed by chapter 245, L. 1880, after it had been made a part of section 1760 of the Code of Civil Procedure.

In *Wait v. Wait* (4 N. Y. 95), it was held that a judgment dissolving a valid marriage for the adultery of the husband did not cut off the wife's inchoate right to dower in lands of which he was at the date of the judgment, or theretofore had been seized; and she having survived, dower was assigned. The court rested its decision on the ground that the sections denying a wife's right to dower when divorced for her adultery, by fair implication saved it when a divorce was granted for the adultery of the husband. The learned judge, who wrote in the case last cited, seems to have overlooked *Charruand v. Charruand* (1 N. Y. Leg. Obs. 134); *Day v. West* (2 Edw. Ch. 592), and *Reynolds v. Reynolds* (24 Wend. 193); and the judgment has not escaped criticism (*Moore v. Hegeman*, 27 Hun, 68; *affd.* 92 N. Y. 521; 2 Bish. M. & D. § 706); but the result reached by it has been lately confirmed by statute. (Code Civ. Pro. § 1754.)

The changes effected by the Revised Statutes in the rights of parties entering in good faith into a marriage while one has a living and undivorced spouse who has been absent for five years and not known to be living, are: (1) The marriage is not void from the beginning, but voidable. (2) When judicially annulled, it is only void from the date of the judgment. (3) When so annulled, the issue may be adjudged entitled to succeed to the estate of the parent who was competent to marry, in the same manner as legitimate children. (4) It has been held that while such a marriage remains unannulled, the cohabitation of the parties is not adulterous (*Valleau v. Valleau*, 6 Paige, 207); also that the survivor is entitled to administration (*White v. Lowe*, 1 Red. 376); and before the passage of the acts for the protection of married women, that the husband could hold and transfer the personal property of the wife. (*Cropsey v. McKinney*, 30 Barb. 47.)

We do not express the opinion that other changes than these mentioned have not been wrought, for we are only concerned

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with the claim that it has changed the common law in respect to the right of a wife to dower under such a marriage after it has been judicially annulled.

The absence of a husband or wife for five years, unheard of during that time, and who is believed to be dead, is not in this state a cause for an absolute divorce.

The effect of a judgment annulling a marriage upon the right of a wife to dower, has never been determined in this state in any reported case except in the one at bar. In *Spies v. Spies* (16 Abb. [N. S.] 112), the second marriage, through which the wife claimed dower, was never dissolved, and she survived her husband, nevertheless, dower was denied her. In *Jones v. Zoller* (29 Hun, 551; 32 id. 280; *S. C.*, *sub. nom. Jones v. Fleming*, 37 id. 228; *revd.* 104 N. Y. 418), the second marriage had not been dissolved, and the wife survived her husband. In *Brower v. Bowers* (1 Abb. Ct. App. Dec. 214), and *Griffin v. Banks* (24 How. Pr. 213; *rev.* 37 N. Y. 621), the voidable marriages considered remained in force until the death of one of the spouses, and were never judicially annulled.

In the case at bar, the learned General Term rested its judgment on the authority of *Wait v. Wait* (*supra*), which was decided upon the ground that the sections above quoted preserved the wife's inchoate right of dower in case she was innocent and he guilty, but in the case at bar, it was found and adjudged in the action wherein the marriage was annulled, that both parties contracted their marriage in good faith, believing that the husband's former wife was dead, which judgment is declared by the statute to be conclusive between them. (2 R. S. 144, § 37.)

The referee upon the trial of the issue in this action found, and the General Term affirmed the finding, that both parties contracted their marriage in good faith. But we do not think those sections (8 and 48) relate to the rights of persons whose marriages are annulled, but only to those of persons divorced for adultery. There now is, and always has been, a broad distinction made by the common law, and in the statutes of this state, between actions brought to annul marriages, by reason

of the incapacity of the parties to legally contract them, and actions brought for their dissolution by reason of acts committed after their due and legal solemnization. The former class was provided for by article second of chapter eight of part second of the Revised Statutes and the latter by the third and fourth articles of the same chapter. The same distinction is still preserved by the Code of Civil Procedure. (Title 1, chap. 15, Code C. P.)

Section forty-eight above quoted is contained in the third article which relates to divorces *a vinculo* on the ground of adultery, and has no application to actions or judgments annulling marriages for causes existing prior to their solemnization.

The word "misconduct" in the eighth section (1 R. S. 74) has been held by this court to mean adultery (*Van Cleef v. Burns*, 118 N. Y. 549), and the section is not applicable to this class of actions.

The plaintiff is not entitled at common law, nor under the statutes of this state, to dower in any of the lands described in her complaint.

The conclusion reached renders it unnecessary to consider the other questions raised by the defendants' appeals, or those presented by the appeal taken by the plaintiff.

The judgments and orders reviewed, subsequent to the judgment entered on the report of H. H. Anderson, referee, reversed, and the judgment entered on the report of H. H. Anderson, referee, on the 9th day of August, 1883, dismissing the complaint with costs is affirmed with costs to each of the defendants appearing by separate attorneys.

All concur.

Judgment accordingly.

Statement of case.

JOSEPH ATWATER, Appellant, v. THE TRUSTEES OF THE
VILLAGE OF CANANDAIGUA, Respondents.

Municipal corporations, engaged in the performance of works of a public nature authorized by law, are not liable for consequential damages occasioned thereby to others, where private property is not directly encroached upon, unless such damages are caused by misconduct, negligence or unskillfulness.

Where, therefore, defendant, while engaged in building a bridge, in pursuance of statutory authority, erected a coffer-dam in the outlet of a lake, which was necessary for the work, which obstructed the flow of the water from the lake and caused it to remain on plaintiff's land, and substantially deprived him of its beneficial use for one season, *held*, it appearing that the work was properly and expeditiously done, that defendant was not liable for the damages; that there was not a taking of plaintiff's property within the meaning of the constitutional provision prohibiting such taking without compensation.

St. Peter v. Denison (58 N. Y. 416); *Pumpelly v. Green Bay Co.* (13 Wall. 166), distinguished.

Also *held*, that the time and the necessity for the construction were matters to be determined by defendant, and in the absence of proof of bad faith, the exercise of this discretion was not the subject for review. Reported below (56 Hun, 293).

(Argued March 4, 1891; decided April 21, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 25, 1890, which overruled exceptions ordered to be heard there in the first instance, denied a motion for a new trial and directed judgment on a verdict in favor of the defendants.

The plaintiff's complaint alleged that in March, 1888, the defendants wrongfully, negligently and carelessly erected a coffer-dam in the outlet of Canandaigua lake, at the foot of Main street, in the village of Canandaigua, and maintained it there, by which the water of the lake was backed upon and over his pasture land, causing damage for which a recovery was sought.

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124 602

173 552

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The defendants, admitting the existence of the dam, put in issue those allegations in other respects and alleged matter in justification.

It appeared that at the time in question there were two outlets of the lake, one of them known as the DuBois outlet, and the other, west of it, known as the feeder, which was made by the Ontario Hydraulic Company in 1856, pursuant to authority given by Laws of 1855, chapter 234. This new channel was made to supply water to mills below, and connected with the old channel one and a half miles from its mouth. Across these outlets and along near the lake shore was a highway or street, known as Lake road, which, at the foot of Main street, came into the latter. By chapter 658, Laws of 1886, the defendants, for the purpose of obtaining drainage and sewerage for the village and to drain and reclaim wet and swamp lands, were empowered to construct a public sewer along the bed of the outlet and the new channel constructed by the Hydraulic Company, and for that purpose to take and appropriate, in the manner provided, the right to use and occupy such outlet and new channel, with such lands as should be necessary to carry out those purposes, but the rights and privileges granted it was provided should be so exercised that the waters of the lake should be maintained at a height not less than ordinary low water mark. And for the purpose of maintaining the water at proper level the defendants were authorized to erect and maintain in the outlet and such new channel locks or bulk-heads, with gates, etc., to so control and regulate the discharge of the waters of the lake as to comply with the provisions of the act. In 1887 the defendants acquired the interest and right formerly had by the Hydraulic Company to regulate and control the flow of water into and through the new channel or feeder and the right to occupy its bed for such sewerage and drainage, with the right of way along the banks, etc. In March, 1888, with a view to the construction of a bridge in the highway across this channel and in combination with it bulk-heads and gates, the defendants caused to be erected a coffer-dam, and thereafter proceeded to construct the bridge

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in the place of an old one, which was in a dilapidated condition. The coffer-dam remained there until in August, when the use for it in the construction of the bridge was accomplished and the dam was removed. The cause of the plaintiff's complaint was that the effect of the dam was to hold back the water of the lake and cause it to remain on his low pasture land situated up the lake a quarter of a mile distant from the dam. The court directed a verdict for the defendants.

Further facts appear in the opinion.

William H. Smith for appellant. The court was not justified in ordering a verdict for the defendants. (2 *Rumsey's Pr.* 294; *Bagley v. Bowe*, 105 N. Y. 171; *Brown v. Bowen*, 30 id. 537; Laws of 1886, chap. 658; Laws of 1855, chap. 234; 35 N. Y. 525; Angell on Watercourses [6th ed.], § 331.) Conceding, as it must be, that there was evidence for the jury that the cause of injury to plaintiff's land was the coffer-dam, the plaintiff had the right to have the evidence submitted to them. (*Radcliff v. Mayor, etc.*, 4 N. Y. 200; *Lansing v. Smith*, 4 Wend. 9; 14 Barb. 405; *N. T. Co. v. City of Chicago*, 99 U. S. 336, 377; *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 106; *Henderson v. N. Y. C. R. R. Co.*, 78 id. 423; *Williams v. N. Y. C. R. R. Co.*, 16 id. 100; *Story v. N. Y. E. R. R. Co.*, 90 id. 122; *Mahady v. B. R. R. Co.*, 91 id. 148; *Coggsell v. N. Y., N. H. & H. R. R. Co.*, 103 id. 10; Const. N. Y. art. 1, § 6.) The flooding of plaintiff's land was a taking of private property, within the meaning of the Constitution. (*Pumpelly v. G. B. Co.*, 13 Wall. 156; *Brown v. Bowen*, 30 N. Y. 537; *Radcliff v. Mayor, etc.*, 4 id. 95; *Mahady v. B. R. R. Co.*, 91 id. 148; *Coggsell v. N. Y., N. H. & H. R. R. Co.*, 103 id. 10; *Scriver v. Smith*, 100 id. 471; Lewis on Em. Domain, § 67.) The claim by respondents that the land was only taken for a temporary purpose, and, therefore, they are not liable, cannot be sustained. (*Williams v. N. Y. C. R. R. Co.*, 16 N. Y. 100; *Wynehamer v. People*, 13 id. 378, 433; 1 Black. Comm. 138; 2 Austin on Juria. [3d. ed.] 817, 818, 836; *Walker v. O. C. W. R. R. Co.*, 103

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Mass. 10, 14; Lewis on Em. Domain, § 58; Cooley on Const. Lim. 674; *M. W. W. Co. v. Sharpstein*, 50 Cal. 284; *St. Peter v. Denison*, 58 N. Y. 416.) Assuming the defendants acted under sanction of legislative authority, and that the injury received by the plaintiff was without remedy had the legislature authorized the act, then the defendants are liable, as they exceeded the authority granted them. (*Wheeler v. Spinola*, 54 N. Y. 385; Laws of 1888, chap. 658, § 1.) The legislature could not give defendants any authority to take private property without compensation. (Lewis on Em. Domain, §§ 66, 67, 69, 70, 71, 104; *Perry v. Worcester*, 6 Gray, 544; *Smith v. City of Rochester*, 92 N. Y. 463.) Assuming that the defendants in constructing the dam in question were engaged as public officers in constructing a bridge in the public highway in the village, and were engaged in constructing the bulk-head and gates, provided for by chapter 658 of the Laws of 1886, under the authority of the legislature, that the cofferdam was a necessity in the prosecution of the work, and was not maintained for an unnecessary time for the completion of the work, yet there was negligence and want of care, and the defendants are liable for this reason. (*Bellinger v. N. Y. C. R. R. Co.*, 23 N. Y. 47; *Losee v. Buchanan*, 51 id. 480.) The trustees were not compelled to build the bridge. (Laws of 1887, chaps. 513, 514, § 27; Laws of 1854, chap. 352, § 1; Laws of 1884, chap. 308.)

Thomas H. Bennett for respondents. The legislature having conferred rightful authority upon the defendant by statutes to execute the public improvements in question, no action will lie in favor of the plaintiff, a riparian owner on the shores of Canandaigua lake. If the plaintiff, under such circumstances, has received any injury whatever, it is *damnum absque injuria*. (*Jermaine v. Waggoner*, 7 Hill, 357; *Radcliff v. Mayor, etc.*, 4 N. Y. 195; *Corey v. B. C. & N. Y. R. R. Co.*, 23 Barb. 482; *Ely v. City of Rochester*, 26 id. 133; *Sweet v. City of Troy*, 62 id. 630; *Bellinger v. N. Y. C. R. R. Co.*, 23 N. Y. 42; *Moyer v. N. Y. C. & H. R. R. R. Co.*, 88 id. 356; *Uline*

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v. *N. Y. C. & H. R. R. R. Co.*, 101 id. 107, 108; *Cuddeback v. D. & H. C. Co.*, 20 Wkly. Dig. 454; *Lansing v. Smith*, 8 Cow. 146; 4 Wend. 9; *Callender v. Marsh*, 1 Pick. 417; *Green v. Reading*, 9 Watts, 382; *O'Connor v. Pittsburg*, 18 Penn. 187; *Smith v. Washington*, 20 How. [U. S.] 135.) The coffer-dam was lawfully placed where it was, and having thus been, the defendant is not responsible for having erected and maintained it while discharging a duty imposed upon it by the legislature, the obstruction not having been permanent or unreasonably prolonged. (*Plant v. L. I. R. R. Co.*, 10 Barb. 26; *N. T. Co. v. City of Chicago*, 99 U. S. 635; *Cummings v. City of Seymour*, 79 Ind. 491.) Although it were possible for the court, upon the evidence, to arrive at the conclusion that the plan of constructing the bridge, bulk-heads and gate, by means of the coffer-dam, was defective, and that the water flowing through the channel could have been carried off while the work was in progress, still the defendant is not liable for incidental injuries occasioned by its adoption. (*Ely v. City of Rochester*, 26 Barb. 133; *Urquhart v. City of Ogdensburg*, 91 N. Y. 67, 70, 71; *Watson v. Kingston*, 114 id. 88; *Rutherford v. Village of Holley*, 105 id. 632; *Heiser v. Mayor, etc.*, 104 id. 68; *Saulsbury v. Village of Ithaca*, 94 id. 27; *Lansing v. Toolan*, 37 Mich. 152; *Detroit v. Beckman*, 34 id. 125; *Monk v. Town of New Utrecht*, 104 N. Y. 552, 561; *Lynch v. Mayor*, 76 id. 60; 2 Dill's Mun. Corp. [4th ed.] § 1046.) Although the plaintiff may have been deprived of the use of a portion of his premises, temporarily, while the structure was being erected and the coffer-dam necessarily maintained, it was not a taking of plaintiff's property within the Constitution. (*Radcliff v. Mayor, etc.*, 4 N. Y. 195; *Bellinger v. N. Y. C. & H. R. R. R. Co.*, 23 id. 42; *Uline v. N. Y. C. & H. R. R. R. Co.*, 101 id. 98; *N. T. Co. v. City of Chicago*, 99 U. S. 635; *Barnes v. S. S. R. R. Co.*, 2 Abb. [N. S.] 415; Cooley's Const. Lim. [3d ed.] 541; *Pumpelly v. G. B. & M. C. Co.*, 13 Wall. 166.) In order to give the plaintiff any right to the unobstructed flow of water through the channel, he must have uninterruptedly

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enjoyed such right under a claim of right, adversely to the owners thereof, for a period of twenty years. (Angell on Watercourses, § 206.) The powers and duties conferred upon the defendants by chapter 658 of the Laws of 1886, and also by chapter 352 of the Laws of 1854, were strictly and exclusively of a public nature, and to be exercised by the municipal corporation as the agents of the public. (*Bailey v. New York*, 3 Hill, 531, 539-541; 2 Den. 433, 450, 451; *Fleming v. Village of Suspension Bridge*, 92 N. Y. 368; *People ex rel. v. Civil Service*, 3 How. [N. S.] 40, 43, 44, 47; *Oliver v. Worcester*, 162 Mass. 489.)

BRADLEY, J. It was within the power of the defendants to construct the bridge and bulk-heads with gates at the place where the work was located and performed. The trustees of the village of Canandaigua were commissioners of highways in and for the village, having the powers of such commissioners (L. 1854, ch. 352, § 1), and in the construction of the bridge they were proceeding pursuant to authority, and in the performance of their duty. The coffer-dam placed in the channel was necessary to the construction of the bridge. It had the effect to stop the flow of water from the lake through the channel known as the feeder, and the only outlet for it during the time the dam remained there was through the DuBois channel. There was evidence tending to prove that from the time of the removal or opening in February, 1888, of the Chapinville dam (located about four miles from the lake) the DuBois outlet had the capacity to take from the lake, and did carry off as much water or more than previously flowed through both channels. This fact was controverted, and the conclusion was warranted that the coffer-dam had the effect to obstruct the discharge to some extent of the quantity of water, when high in the lake, which the two channels had been accustomed to carry off before the removal of the dam, and that the continuance of water on the plaintiff's land longer than it otherwise would have remained there was attributable to the coffer-dam. While the water was no higher and covered

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no more of this land that spring than it had years before, and was not so high as in the spring of 1887, it remained on the plaintiff's pasture field longer, and it was the continuance of it there which impaired the usefulness of the land and substantially deprived him of the beneficial use of it that season. The question, therefore, is whether or not the alleged justification is a defense against liability of the defendants for injury suffered by the plaintiff. The Hydraulic Company took, by statute (L. 1885, ch. 234), the right to maintain bulk-head and gates in the channel subject to "liability for all damages occasioned thereby actually sustained by any person whatsoever." The mere acquirement of the rights of that company afforded no means of protection of the defendants against liability for injury occasioned by the use of the privileges to which they succeeded. Nor can they be relieved unless their rights were superior to those of persons engaged in work private in character. The doctrine, however, is well established in this state, that public officers lawfully employed in making public improvements, and corporations engaged in the performance of work of a public nature authorized by law, are not liable for consequential damages occasioned by it to others unless caused by misconduct, negligence or unskillfulness. (*Radcliff's Executors v. Mayor, etc.*, 4 N. Y. 195; *Bellinger v. N. Y. C. R. R. Co.*, 23 id. 42; *Moyer v. N. Y. C. & H. R. R. R. Co.*, 88 id. 351; *Uline v. N. Y. C. & H. R. R. R. Co.*, 101 id. 98.) And such is the weight of authority elsewhere. (*Transportation Co. v. Chicago*, 99 U. S. 635, 641.)

By virtue of these lawful powers the trustees, as commissioners of highways, were authorized to construct the bridge, and the power was conferred upon them by statute to erect bulk-heads and gates to regulate the flow of water in the channel, which the municipal corporation had appropriated for the purposes of sewerage and drainage. (Laws 1886, ch. 658.) And they had the lawful authority to do whatever was essential to the proper performance of the work of making the improvement. It was for that purpose only that the cofferdam was erected. The necessity for it made it lawful, and its

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usefulness was dependent upon the obstruction by it of the flow of water in the channel at the place where the improvement was made. The necessary consequence was to hold back the water which would otherwise have gone through this one in excess of that which passed down the other channel during the time the coffer-dam was there.

It is urged on the part of the plaintiff that the damages were incurred by the direct and physical invasion of his land by the defendants in the construction of the dam, and that it constituted a taking of his property within the meaning of the provision of the Constitution, that private property shall not be taken for public use without compensation. This subject has had much discussion and judicial consideration, and that consequential damages to property of others occasioned by the performance of public work are not treated as the taking of it within the meaning of the Constitution, is not an open question in this state, as will appear by reference to the cases before cited. The dam did not, nor did any of the work, encroach upon the plaintiff's premises. The right to construct this dam and thus obstruct the flow of water in that channel to the prejudice of owners of property affected by it, depended upon its necessity for the purpose of the work of the public improvement according to the plan devised for the structures to be erected. And, assuming as we do, for the purpose of the question now under consideration, that it was such, and that they properly and expeditiously performed the work, it is not seen within the doctrine before stated how the defendants can be held liable for the consequences resulting from it to others. Within this rule serious injury to property may be occasioned by the lawful exercise of powers of public character pursuant to law, and if the work is carefully and skillfully performed, the consequences may be *damnum absque injuria* when the legislature has provided for no compensation. In such case the protection of the owner of property not taken or appropriated, which may be subjected to hazard of injury, is in the care and skill to be observed by those engaged in the execution of the work. If they fail to do that, they are liable for the consequences of such failure.

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In the present case the action of the defendants in the performance of the work was confined within the limits where they had the right to execute it, and the effect upon property beyond those bounds resulting in damages was the consequence of such performance of the work, and not the direct act of its execution by them. In that respect this case is distinguishable from that of *St. Peter v. Denison* (58 N. Y. 416). There the defendant was held liable because, by casting stone upon the premises, he committed a trespass; and the fact that he was engaged in the performance of a public work and the fragment of rock was in the process of blasting thrown upon the land of another, was no justification. Here the injury to the plaintiff's premises was not done directly by any act of the defendants, but it was the consequence following and tracable to the work as the cause. In the one case the act of the party was, and in the other not, a direct invasion of the premises of the plaintiff. The distinction between the principle of the *Radcliff* and *Bellinger* cases and the *St. Peter* case is recognized by Judge FOLGER in the latter. The dam was but a temporary structure, essential to make the public improvement, and was removed when that was accomplished. The damages so resulting from such cause have quite uniformly been treated as furnishing no common-law remedy. (*Plant v. L. I. R. R. Co.*, 10 Barb. 26; *Matter of Squire*, 34 N. Y. St. R. 722.)

In *Pumpelly v. Green Bay Co.* (13 Wall. 166), the defendant not only by its dam raised the water in Fox river above the height authorized by the statute, but the dam and its consequences of flooding the plaintiff's land was permanent. And in *Transportation Co. v. Chicago*, the *Pumpelly* case and another are mentioned as those in which the extremest qualification of the doctrine is to be found in support of an action for damages sustained in consequence of the performance of a public work. But added that "in those cases it was held that a *permanent* flooding of private property may be regarded as a taking." And in that case the court held that "acts done in the proper exercise of governmental powers and

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not directly encroaching upon private property, though their consequences may impair its use are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action. This is supported by an immense weight of authority." In order to have protection against liability, the work must not only be done for the purposes of the public and by authority of law, but it must be done in manner and method reasonable with a view to as little injury to others as practicable, and with reasonable care, skill and dispatch.

It may be observed that the plaintiff does not allege delay on the part of the defendants in the commencement or prosecution of the work of construction of the bridge. The further question is whether the inference from the evidence was fairly permitted that the defendants were chargeable with any want of care which caused the injurious consequences suffered by the plaintiff. The propositions which the court was specifically requested to submit to the jury in that respect were whether the defendants constructed the dam at an unreasonable time, being shortly before the spring floods; also whether they should not have taken the water around the place of the work rather than hold it back from the channel by the dam. The time and the necessity for the construction of it were matters to be determined by the trustees, upon whom was imposed the duty in that respect. And assuming, as we must upon the evidence, that they acted in good faith, their exercise of discretion in those respects is not the subject of review. (*Talcott v. City of Buffalo*, 125 N. Y. 280.)

It appears that it was necessary to put in the dam when the water in the channel was low, and that it could not be properly done in the spring during high water which usually came in April and May, and sometimes later. While it may be that they could with propriety have, without serious prejudice to the use of the highway by the public, have delayed the work until low water in the summer, there is no support for the imputation of bad faith on the part of the defendants in erect-

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ing the dam at the time they did. If the municipal corporation had owned the adjacent land it may at the requisite expense, which it seems would have been large, have dug a channel of sufficient width and depth around the place where the work was done; but it does not appear that this could have been accomplished by any reasonable means. The circumstances of this case are not such that the omission of the defendants to resort to all possible means to overcome the obstruction by the dam to the flow of water into and through this channel during the time reasonably necessary for the work, rendered them chargeable with negligence in the performance of their duty, although the consequence was that water remained on the plaintiff's premises longer that season than usual.

These views lead to the conclusion that the evidence was not such as to support a verdict for the plaintiff.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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132	369

124	612
f 148	180

MORITZ PACH, Respondent, v. FRANK T. GILBERT, as Sheriff, etc., Appellant.

In an action against a sheriff for a failure to return an execution within sixty days after its delivery to him, proof of the delivery and failure to return establishes *prima facie* plaintiff's right to recover the full amount defendant was commanded by the execution to collect.

Where a warrant of attachment has been vacated and a levy thereunder released, a subsequent restoration of it does not operate to burden the property levied upon in the hands of a *bona fide* purchaser, or of an assignee for the benefit of creditors.

In such an action it was conceded that O., the judgment debtor against whom the execution was issued, did not have, at the date it was issued, or at any time thereafter, any property out of which it could have been satisfied. It appeared, however, that a warrant of attachment had been issued in the action and delivered to defendant as sheriff, who, by virtue thereof, levied upon sufficient property of the debtor to satisfy plaintiff's claim. The judge who granted the warrant, on an *ex parte* application, made an order vacating it and the sheriff thereupon released

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the goods from the levy; they were thereafter levied upon by him, by virtue of executions issued upon other judgments against O. The latter, subsequent to such levy, made an assignment for the benefit of creditors. Said order was thereafter, upon application of plaintiff, set aside. The order setting it aside contained this provision: "the lien of said attachment is restored." On appeal to this court the order was modified by striking out this provision and, as so modified, affirmed. While the attachment, the order vacating it and the order setting aside the order of vacation were in his hands, the sheriff sold the property under said executions and the proceeds of sale, which were more than sufficient to satisfy plaintiff's execution, were wholly applied by the sheriff upon the other executions. *Held*, that while the order restoring the vitality of the attachment did not operate to affect or change the rights which the assignee had acquired in the property under said assignment, yet it gave to the attachment validity in the hands of the sheriff as of the date when it was issued, and it became his duty to apply sufficient of the proceeds of the sale so made by him upon the other executions in satisfaction of plaintiff's execution (Code Civ. Pro. §§ 697, 1406, 1407); that the modification of the order restoring the attachment did not affect plaintiff's rights in this respect; and that, therefore, defendant failed to show in mitigation that plaintiff was not injured by his action.

(Argued March 6, 1891; decided April 21, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made December 9, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court and affirmed an order denying a motion for a new trial.

The nature of the action and the material facts are stated in the opinion.

Charles B. Wheeler for appellant. The answer that the judgment debtor had no property upon which the sheriff could have levied and made the amount of the plaintiff's execution constitutes a good defense to an action to charge the sheriff with damages for a failure to return the execution issued to him within the required sixty days. (*Ledyard v. Jones*, 7 N. Y. 551; *Brookfield v. Remsen*, 1 Abb. Cas. 211.) The facts, therefore, set up by the answer constitute a perfect defense to the action, unless the fact that the order setting aside the order

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vacating the attachment operated to restore the lien of the attachment, which it did not and could not do. (Code Civ. Pro. § 649; *Anthony v. Wood*, 96 N. Y. 180; *Smith v. Orser*, 43 id. 132; *U. S. v. Goff*, 4 Hun, 634; *Marshall v. McGregor*, 59 Barb. 519; *Haggerty v. Wilbur*, 16 Johns. 287; *Burkhardt v. Sanford*, 7 How. Pr. 398; *Leonard v. Vandenburg*, 8 id. 78; *Colton v. Caup*, 1 Wend. 366.) When the warrant of attachment herein was vacated, the sheriff was compelled by law to surrender the property. (Code Civ. Pro. § 709.) The proceedings, therefore, left the defendant, Lizzie Orr, in the complete control of the property with right and power of disposing of the same. (*Greentree v. Rosenstock*, 61 N. Y. 583; *Anthony v. Wood*, 96 id. 180.) Section 1407 of the Code has no application to a case where the circumstances are like those in this case. (Code Civ. Pro. § 713; *Rodgers v. Bonner*, 55 N. Y. 9, 27.)

O. O. Cottle for respondent. The court did not err in refusing the defendant's request for direction of judgment in his favor. (*Corning v. Southland*, 3 Hill, 552; *Fisher v. Pond*, 2 id. 338; *Burk v. Campbell*, 15 Johns. 456; *Brookfield v. Remson*, 1 Abb. Ct. App. Dec. 210; *Wehle v. Connor*, 63 N. Y. 258; *Peck v. Hurlburt*, 46 Barb. 559; *Sandford v. Roosa*, 12 Johns. 162.) The defendant's exception to the direction of a verdict in favor of the plaintiff was not well taken. (*Kleinberger v. Brown*, 8 N. Y. Supp. 866; *Ormes v. Dauchy*, 82 N. Y. 443; *Dillon v. Cockraft*, 90 id. 649; *Kirtz v. Peck*, 113 id. 222; *Kennedy v. O. & S. R. R. Co.*, 67 Barb. 169; *Mayer v. Dean*, 115 N. Y. 559; Baylies' Tr. Pr. 230; *Howell v. Wright*, 122 N. Y. 667; *Tuers v. Tuers*, 100 id. 202; *Mabie v. Bailey*, 95 id. 211; *Thompson v. Halbert*, 109 id. 329.) The court will not consider any questions not raised by proper exceptions. (*Mayer v. Dean*, 115 N. Y. 559; *Goodrich v. Gebhard*, 21 J. & S. 520.) When the property came into the sheriff's hands under any other process, no formal levy by the sheriff was necessary under the attachment. The fact of his having the attachment was sufficient. The levy

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under one process inured to them all. (*Dean v. Campbell*, 19 Hun, 534, 536, 537; *Peck v. Tiffany*, 2 Com. 451, 456, 457; *Colton v. Camp*, 1 Wend. 365; Smith on Sheriffs, 343, 344; *Farnsworth v. W. U. T. Co.*, 6 N. Y. Supp. 735; *Wambaugh v. Gates*, 8 N. Y. 144, 146, 147.) Wherever a lien is acquired by a judgment, execution, or otherwise, has been vacated by mistake, or by an irregular or erroneous order or judgment the mistake or error will be corrected, and the person whose lien has been disturbed will regain his original position and rights as against every one who is not a *bona fide* purchaser, or does not stand in a similar relation, by parting with something valuable, relying upon the apparent discharge of the lien. (Code Civ. Pro. §§ 1292, 1323, 2142, 3263; *King v. Harris*, 30 Barb. 471; 34 N. Y. 330; *Colton v. Camp*, 1 Wend. 365; *Slocum v. Freeman*, 46 How. Pr. 437; *Wardell v. Eden*, 2 Johns. Cas. 173, 258; *Hackett v. Belden*, 40 How. Pr. 289; *Suydam v. Holden*, 1 Seld. Notes, 170; *Sears v. Burnham*, 17 N. Y. 445; *Hunt v. Grant*, 19 Wend. 90; *Close v. Gillespie*, 3 Johns. 526; *Chichester v. Cande*, 3 Cow. 39; *Hart v. Reynolds*, 3 id. 42, 56; *McGuckin v. Coulter*, 1 J. & S. 328; *Chamberlain v. Choles*, 35 N. Y. 479; *Withers v. Harris* 2 Ld. Raym. 806; *Wallace v. Bedell*, 105 N. Y. 11.) A judgment creditor, who has obtained his judgment by adverse proceedings, one to whom a judgment has been confessed as security for a precedent debt, or a voluntary assignee for the benefit of creditors, has no equity which will deprive a party of his lien that has been illegally vacated, if he ultimately reverses or sets aside the judgment or order which set aside his lien. (*King v. Harris*, 30 Barb. 475; 34 N. Y. 333; *Sears v. Burnham*, 17 N. Y. 445; *Hunt v. Grant*, 19 Wend. 91; *Chichester v. Cande*, 3 Cow. 39; *Woodmansel v. Rodgers*, 59 How. Pr. 402; *Arnold v. Patrick*, 6 Paige, 310; *Shirley v. S. R. Co.*, 2 Edw. Ch. 505; *Burlinghame v. Robbins*, 21 Barb. 327; *Weaver v. Barden*, 49 N. Y. 286, 291; Story Eq. Juris. § 416; *Stalker v. McDonald*, 6 Hill, 93; *Devoe v. Brandt*, 53 N. Y. 462.) The order setting aside the order vacating the plaintiff's attachment restored the attachment *ab*

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initio, and left the plaintiff's rights under the attachment the same as they would have been had no order vacating it been made. (*King v. Harris*, 30 Barb. 474; *Murray v. Bedell*, 98 N. Y. 481; *Wambaugh v. Gates*, 8 id. 138; *Farnsworth v. N. U. T. Co.*, 6 N. Y. Supp. 735; *Hall v. Andrews*, 65 N. Y. 572.) Where money has been paid on a judgment which was afterwards reversed, an action lies to recover it back. (*Scholey v. Halsey*, 72 N. Y. 578; 24 Wend. 32; 20 N. Y. 306; 29 Barb. 87.) There were no subsequent purchasers or incumbrancers without notice of the plaintiff's warrant of attachment, its levy, and the facts and irregularities entitling the plaintiff to have the order vacating it set aside, leaving it the first process delivered to the sheriff and the first lien. (*Cragie v. Hadley*, 99 N. Y. 131.)

PARKER, J. This action is brought to recover of the defendant for failure to return an execution issued upon a judgment in his favor against Lizzie Orr within sixty days after its delivery to him. The delivery of the execution and failure to return it within the time prescribed by statute was admitted, and thus was established *prima facie* the plaintiff's right to recover the full amount which the defendant was commanded by the execution to make out of the property of the defendant therein. (*Ledyard v. Jones*, 7 N. Y. 550.)

The defendant in mitigation of damages asserted that it was not possible for him to have collected the amount of the execution or any part thereof out of defendant's property. It is conceded that the defendant did not have, at the date of issuing the execution or at any subsequent time, any property out of which it could have been satisfied in whole or in part. But the plaintiff insists that by virtue of prior proceedings taken in the action there should have been in the hands of the sheriff applicable to the payment of the judgment moneys sufficient for that purpose; that if there was not, it was solely due to the fault of the defendant and, therefore, not available to him in this action by way of mitigation of damages. It appears that on the 30th day of December, 1887, a warrant

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of attachment in that action was granted, and on the same day at 3.40 P. M., delivered to the defendant, as sheriff of Erie county; he executed the warrant within two hours thereafter by making a levy on a stock of dry goods belonging to Lizzie Orr, the defendant; the property so levied on was sufficient to satisfy the plaintiff's demand; on the same day the judge who granted the warrant of attachment, on an *ex parte* application, made an order vacating it; such order was duly served on the sheriff the same evening, who thereupon and on the day following went to the store of Mrs. Orr and formally released the goods from the levy made under the attachment. Thereafter and until January third, she continued to sell goods from the store as formerly, and on that day she confessed judgments in favor of certain creditors, upon which executions were issued against her property to the sheriff, who, on the fourth day of January, levied on the stock of goods of the judgment debtor. Such confessions of judgment were followed by a general assignment for the benefit of creditors, made by the judgment debtor, Lizzie Orr, dated January 4, 1888, and which was duly filed in the county clerk's office on the day following. January 12, 1888, on motion of the plaintiff in *Pach v. Orr*, an order was made setting aside the order of December thirtieth, vacating the warrant of attachment, which order also contained a provision that "the lien of said attachment is restored." This order was subsequently affirmed at General Term, but on appeal to the Court of Appeals it was modified by striking out such provision, and as thus modified affirmed. The Special Term order was, immediately following the granting thereof, served on the sheriff. While the warrant of attachment, the order vacating it and the order setting aside the order of vacation were in his hands, and, on January sixteenth, he sold the property of the judgment debtor under the executions issued January fourth. The sum realized on that sale was more than sufficient to pay the amount of the execution now in controversy, but the proceeds of the sale were by the sheriff wholly applied on the executions issued on the judgments confessed January third. The grant-

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ing of the order vacating the attachment followed by the action of the defendant in going to the store and formally releasing the goods from the levy made, operated to destroy all rights which had been acquired by the granting of the warrant of attachment and levy thereunder. Before that order was set aside, other judgment creditors issued executions and caused levies to be made on the property of the defendant, which was followed by a general assignment on her part for the benefit of creditors, and the first contention on the part of the plaintiff is that the order setting aside the first order operated to restore the rights which had been acquired in that property by virtue of the attachment and levy thereunder. It is asserted by the defendant that this question has been passed on by this court adversely to plaintiff's contention. This assertion is founded on the fact that the court modified the order setting aside the order vacating the warrant of attachment by striking out the clause which provided that "the lien of said attachment is restored," and it is urged that this was in effect a determination by this court that it did not rest within the power of the Special Term to restore to the plaintiff the rights lost by the vacation of the warrant of attachment. While this was not necessarily the decision made, it may well have been concluded that the court could grant to the plaintiff on that application no other relief than would be afforded by setting aside the order vacating the attachment, and that the only possible effect of the provision would be to embarrass the intervening rights of third parties, if such there should prove to be. When the warrant of attachment was vacated and the levy thereunder released, the situation of the property was, for the time being, the same as if there had never been a warrant of attachment issued, and a subsequent restoration of that warrant of attachment could not operate to burden the property in the hands of a *bona fide* purchaser, nor become a charge upon it in the hands of an assignee acquiring the property by virtue of a general assignment for the benefit of creditors. Executions become liens on personal property from the time of the delivery thereof to the proper party to be executed.

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(Code of Civil Procedure, § 1405.) But no lien is acquired by the granting of a warrant of attachment or by the delivery of the same to the sheriff for execution. The right to subject a debtor's property capable of manual delivery to levy and sale under an execution to be issued on a judgment thereafter to be obtained can only be acquired by the act of the sheriff in taking the property sought to be attached in his actual possession. "No other mode is prescribed. Nothing else will constitute the levy. Until the officer has obtained actual custody he has made no levy, and can make none." (*Anthony v. Wood*, 96 N. Y. 180.)

But while we are of the opinion that restoring the vitality of the warrant of attachment did not operate to affect or charge the rights which the assignee had acquired in the property, a question is presented whether it was not the duty of the sheriff under the statute to apply the proceeds realized on the sale under the executions so far as would have been necessary in order to satisfy the execution which is the subject of this controversy.

The effect of setting aside the order vacating the warrant of attachment was to give it validity in the hands of the sheriff as of the date when it was issued. Because of the order of vacation and the act of the sheriff in releasing his levy, the right to retain control of the property and subsequently subject it to sale under an execution to be thereafter issued in such action was lost because in the meantime the title to the property had passed to another.

Therefore, the remaining question is whether it was the statutory duty of the sheriff to give preference in his application of the funds realized from the sale made under the executions to the warrant of attachment first issued to him, notwithstanding the absence of a levy thereunder.

Section 697 of the Code of Civil Procedure provides that "where two or more warrants of attachment against the same defendant are delivered to the sheriff of the same county to be executed, their respective preferences, and the rules, where a levy, or a levy and sale, have been made under a junior

warrant, are the same as where two or more executions against the property of the same defendant are delivered to the sheriff to be executed."

Section 1406 provides that "where two or more executions against property are issued out of the same or different courts of record against the same judgment debtor, the one first delivered to an officer to be executed has preference, notwithstanding that a levy is first made by virtue of an execution subsequently delivered."

Under this section, which is substantially a re-enactment of section 14, part 3, chapter 6, title 5, 2 R. S., notwithstanding a sale be made under a junior execution, the sheriff must first apply the proceeds in satisfaction of the execution first delivered to him, although no levy has been made thereunder. (*Peck v. Tiffany*, 2 N. Y. 451; *Patterson v. Perry*, 5 Bosw. 518-535; *Atwood v. Lynch*, 5 J. & S. 5-11.)

While the first section quoted provides for the order of preference where two or more warrants of attachment are delivered to the sheriff and the second where two or more executions are issued to him, section 1407 makes provision for a situation presented by the delivery to the sheriff of executions and warrants of attachment. It declares that "where there are one or more executions and one or more warrants of attachment, against the property of the same person, the rule prescribed in the last section (1406) prevails in determining the preferences of the executions or warrants of attachment, the defendant in the warrants of attachment being for that purpose regarded as the judgment debtor."

Thus by statute it is made the duty of a sheriff to give preference in the application of proceeds of a sale under junior executions to a prior warrant of attachment although no levy be made thereunder. As the warrant of attachment in question came first into his hands, and the effect of the last order made was to give it vitality as of the date when delivered to him it should have been treated in the application of the proceeds of the sale as if he had neglected to make a levy under it, but had instead levied and sold under executions subse-

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quently issued. This the defendant did not do. He has, therefore, failed in his attempt to show in mitigation of damages that the plaintiff was not injured by his action.

The judgment should be affirmed.

BRADLEY, J. My view is that there was no destruction of the lien of the attachment, but that when the order vacating it was set aside, the lien of the attachment was rendered effectual (except as against *bona fide* purchasers or mortgagees) from the time of the levy of it on the goods, notwithstanding the apparent surrender of the custody of them by the sheriff.

I concur in the result.

All concur, BRADLEY, J., in result.

Judgment affirmed.



MEMORANDA

OF THE

*CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, WHICH ARE NOT REPORTED IN FULL.*

JAMES M. COMEY, Appellant, *v.* WALLACE C. ANDREWS,
Respondent.

(Argued December 5, 1890; decided January 14, 1891.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made March 5, 1888, which reversed a judgment in favor of plaintiff entered upon the report of a referee and ordered a new trial.

Matthew Hale for appellant.

Everett P. Wheeler and *James W. Hawes* for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed, and judgment absolute for respondent.

ROBERT DOUAI, Appellant, *v.* THE METROPOLITAN ELEVATED
RAILWAY COMPANY et al., Respondents.

(Argued December 5, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 23, 1888, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Circuit.

Henry Wehle for appellant.

Brainard Tolles for respondents.

Agree to affirm; no opinion.

All concur, except VANN and PARKER, JJ., not voting.

Judgment affirmed.

MICAJAH W. JACKSON, Respondent, v. THE CITY OF ROCHESTER,
Appellant.

(Argued December 5, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 25, 1887, which denied a motion of the defendant for a new trial and ordered a judgment for the plaintiff upon a verdict in his favor.

The following is the *mem.* of opinion herein:

"This case differs in no material respect from one recently decided by this court against the same defendant (*Hooker v. City of Rochester*, 107 N. Y. 676).

"No attempt was made by the learned counsel for the appellant to distinguish the two cases, and a careful examination of the appeal book in each enables us to say that no distinction in fact exists. As the same questions, arising out of substantially the same facts, are brought before the court a second time, it is our duty to pronounce the same judgment.

"This appeal was taken March 23, 1886, and the decision in the *Hooker* case was handed down December 20, 1887. As the defendant persisted in its appeal, and insisted upon arguing it after all the questions involved had been finally passed upon by this court, nearly three years before, we award to the plaintiff as damages by way of costs for the delay, pursuant to section 3251, subdivision 5, of the Code of Civil Procedure, ten per cent upon the amount of the original judgment.

"The judgment should be affirmed, with costs, and an allowance of ten per cent upon the amount of the original judgment."

Henry J. Sullivan for appellant.

George A. Benton for respondent.

Per Curiam opinion for affirmance.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.
Judgment affirmed.

MICAJAH W. JACKSON, Respondent, *v.* **THE CITY OF ROCHESTER**,
Appellant.

(Argued December 5, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made April 19, 1887, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Henry J. Sullivan for appellant.

George A. Benton for respondent.

Agree to affirm, but without prejudice to an application by the defendant to the Supreme Court for such other stay of the issuing of the injunction awarded by it as may, under the circumstances of the case, seem to that court proper; no opinion.

All concur, except **BRADLEY** and **HAIGHT, JJ.**, not sitting.
Judgment affirmed.

THOMAS H. RODMAN, as Surviving Executor, etc., et al.,
Respondents, *v.* **THE CITY OF BUFFALO**, Appellant.

(Submitted December 8, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made April 14, 1888, which modified and affirmed as modified a judgment in favor of plaintiffs, entered upon a verdict and affirmed an order denying a motion for a new trial.

George M. Browne for appellant.

Frank C. Ferguson for respondents.

Agree to affirm; no opinion.

All concur, except **BRADLEY** and **HAIGHT, JJ.**, not sitting.
Judgment affirmed.

LEMAN W. TYLER, Appellant, *v.* VICTOR COOPER, Respondent.

(Argued December 8, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 17, 1888, which modified and affirmed as modified a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

Watson M. Rodgers for appellant.

C. W. Thompson for respondent.

Agree to affirm ; no opinion.

All concur, except FOLLETT, Ch. J., and VANN, J., not sitting.

Judgment affirmed.

AMELIA M. ROBINSON, Appellant, *v.* THE CITY OF BROOKLYN,
Respondent.

(Argued December 12, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made June 27, 1887, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial without a jury.

Arthur H. Ely for appellant.

William T. Gilbert for respondent.

Agree to affirm ; no opinion.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

WILLIAM H. WOOD, Appellant, v. THE MAYOR, ALDERMEN
AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

(Submitted December 15, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made January 10, 1888, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Circuit.

James M. Lyddy and *William M. Lyddy* for appellant.

D. J. Dean and *John J. Delany* for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

HENRY MUHLKER, Respondent, v. JACOB RUPPERT, Appellant.

Where fixed monuments are referred to in the description in a deed, which sufficiently locate and determine the premises conveyed, they will control courses and distances.

Smyth v. McCool (22 Hun, 595), distinguished.

Reported below 23 J. & S. 359.

(Submitted December 16, 1890; decided January 14, 1891.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made March 6, 1888, which reversed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term, and ordered a new trial.

The following is the opinion in full:

"This action was brought to compel the specific performance of a contract for the purchase of real estate. The defense was that the plaintiff did not have title to the westerly five feet of land embraced in the contract.

"The land contracted to be conveyed is located in the city of New York on the southerly side of One Hundred and Twenty fourth street, and has a frontage upon that street of

thirty-nine feet, commencing at the intersection of Fourth avenue, and westerly therefrom. One Grace T. Turnbull, formerly Smith, is the owner of the lot adjoining on the west, whose title was derived from the same source as that of the plaintiff, but of prior date. Her lot has a frontage of eighteen feet, and commences at a point, as is claimed, 298 feet easterly from the intersection of Madison avenue with One Hundred and Twenty-fourth street. It is contended on the part of the appellant that the easterly line of Madison avenue is but 400 feet from the westerly line of Fourth avenue, and that consequently Mrs. Turnbull's lot laps over five feet upon the lot embraced in the contract in question; whilst on the part of the plaintiff it is claimed that at the time of the conveyance to Mrs. Turnbull the distance between the two avenues at this point was 405 feet.

"But under the view taken by us of this case it becomes unnecessary to consider this question or construe the statutes under which Madison avenue was laid out as an avenue of the city of New York.

"The lands upon the southerly side of One Hundred and Twenty-fourth street in the block in question formerly belonged to Thomas Fealey and David Houston, who erected twelve buildings thereon, including the one covering the lot now owned by Mrs. Turnbull. Her title is derived through the foreclosure of a mortgage which was given to her by Fealey and Houston. The mortgage described the property as beginning at a point on the southerly side of One Hundred and Twenty-fourth street distant 298 feet easterly from the corner formed by the intersection of the easterly line of Madison avenue with the southerly side of One Hundred and Twenty-fourth street *at or in front of the middle of a party-wall*; running thence southerly and parallel with Madison avenue and partly through the center of said party-wall 100 feet and 11 inches to the center of the block; thence easterly in the center line of the block and parallel with One Hundred and Twenty-fourth street eighteen feet; thence northerly and parallel with Madison avenue and partly through the center of a party-wall 100 feet and 11 inches to the southerly side of One Hundred and Twenty-fourth street, and thence westerly along the southerly

side of One Hundred and Twenty-fourth street eighteen feet to the place of beginning.

"So that, it will be observed that the beginning point of Mrs. Turnbull's land was at or in front of the middle of a party-wall, and that this party-wall formed a portion of the westerly boundary of her lot; that the easterly line also passed through a party-wall, which, in part, formed the eastern boundary of her lot. The testimony of Housten is to the effect that the building upon this lot was erected before the mortgage was given to Mrs. Turnbull; that the house was known as No. 68; that it was their intention to mortgage to her the lot covered by the house. It appears to us that these party-walls are fixed monuments which sufficiently locate and determine her land. The evidence sufficiently locates the party-walls referred to, they are the easterly and westerly walls to the house known as No. 68 One Hundred and Twenty-fourth street.

"Our attention has been called to the case of *Smyth v. McCool* (22 Hun, 595), in which it was claimed a different conclusion was reached. But our examination of that case leads to no such result. The description in that case began at a point in the easterly line of Madison avenue, distant sixty-three feet northerly from the crossing formed by the intersection of the northerly line of Sixty-first street; thence running northerly along the easterly line of Madison avenue sixteen feet; thence easterly and parallel with Sixty-first street and part of the distance through the center of a party-wall, etc. The court, in commenting on the language used in the description says, that it ran along '*Madison avenue sixteen feet, not sixteen feet to the center of a party-wall*,' and then argues that it ran to no point or monument which would fix the boundary of the lot. But it will be observed that in the case under consideration the line commenced at a point on One Hundred and Twenty-fourth street ninety-eight feet from the intersection of Madison avenue, *at or in front of the middle of a party-wall*, thus fixing and describing the monument from which the boundary of the lot commenced.

"But, again, as we have already stated, Mrs. Turnbull derived her title through a foreclosure of her mortgage and a

sale had thereunder. And it appears that prior to such foreclosure Fealey and Houston had conveyed the lot covered by the mortgage to Cornelius J. McCarthy, describing it as known as street No. 68 One Hundred and Twenty-fourth street, and as eighteen feet wide, distant eighty-nine feet from the westerly line of Fourth avenue, as widened, just the width of plaintiff's land, and McCarthy had conveyed the same to one Henry Magets, describing it in the same way, and that Mrs. Turnbull, in her complaint asking for a foreclosure of her mortgage, sets up these conveyances and alleges them to be conveyances of the mortgaged premises, thus asserting that the lands covered by those deeds were the same as that covered by her mortgage, and we do not understand that she has ever made any other claim.

"We, consequently, are of the opinion that the order of the General Term should be affirmed, and that judgment absolute should be ordered against the appellant upon the stipulation, with costs."

Ashbel P. Fitch for appellant.

Austen G. Fox for respondent.

HAIGHT, J., reads for affirmance of order of General Term, and for judgment absolute in favor of plaintiff.

All concur.

Order affirmed and judgment accordingly.

GEORGE SCHAPER, Respondent, v. THE BROOKLYN AND LONG ISLAND CABLE RAILWAY COMPANY, Appellant.

Neither the General Railroad Act (Chap. 140, Laws of 1850), nor the acts amendatory and supplementary thereto, confer upon a company incorporated under it the right to build an elevated railroad in the streets of a city.

A corporation, therefore, organized under said act for the purpose of constructing such a road in the streets of the city of Brooklyn, has no power so to do without first complying with the conditions of the charter of said city (§ 23, tit. 19, chap. 863, Laws of 1873), prescribed as prerequisites to the right to construct a railroad in its streets.

(Argued December 16, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 16, 1886, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This was an action to restrain the defendant, a corporation organized under the General Railroad Act, having for its purpose the construction of an elevated railroad in the city of Brooklyn, from entering upon and proceeding in the further construction of its railroad in front of the premises of plaintiff.

The following is the opinion in full:

"The decision of this court in *In re People's Rapid Transit Co. v. Bowie Dash*,* requires an affirmance of the judgment. The defendant, intending to construct an elevated railroad along and over certain streets in the city of Brooklyn, commenced the erection of it in part on Boereum place and in front of property owned by the plaintiff. The plaintiff, insisting that such action was without legal right, brought this suit to restrain the defendant from entering upon and proceeding in the further construction of the railroad in front of his premises.

"Section 23, title 19, chapter 863, Laws of 1873 (the charter of the city of Brooklyn), provides that 'It shall not be lawful hereafter to lay, construct or operate any railroad in, upon or along any or either of the streets or avenues of the city of Brooklyn wherever such railroad may commence or end unless a majority of the owners of property upon the streets or avenues in or along which such railroad is to be constructed shall first petition the common council of said city therefor, nor unless the said common council shall authorize the construction of such railroad, and the grant therefor shall have been awarded and given to the person who will agree, with adequate security, to carry passengers on such railroad at the lowest rate of fare.' This section, continuing, excepts from its operation various existing and specially named railroad companies, and such 'other companies as are or may be authorized by law.'

* This case will appear in 125 N. Y. 98.

"No steps were taken by the defendant or the common council of the city in compliance with such provisions; a majority of the owners of property upon the streets or avenues along which it was contemplated to build said road did not petition the common council therefor, and that body did not award a grant of the right to construct to a person agreeing to carry passengers on such road at the lowest rate of fare. But the defendant insisted that because it was organized under the General Railroad Act of 1850, and the acts amendatory thereof and supplementary thereto, the provisions of the charter quoted were not applicable to it; that it was only required to obtain the consent of the common council in the manner provided by that act, which it did. The reasons assigned in support of that position need not be stated or discussed. Since they were presented to us by counsel the decision cited *supra* has been made. It requires the determination that the General Railroad Act of 1850, and its amendatory and supplementary acts, did not confer upon a company incorporated under it the right to build within the limits of a city a structure of the character of that contemplated and undertaken by the defendant. The question discussed by the General Term need not, therefore, be considered.

"The judgment should be affirmed."

Wm. C. De Witt for appellant.

George W. Wingate for respondent.

PARKER, J., reads for affirmance.

All concur.

Judgment affirmed.

HARVEY FIKES, Respondent, *v.* JOHN BOUCK, Appellant.

(Submitted December 16, 1890; decided January 14, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order

made May 3, 1887, which affirmed a judgment in favor of plaintiff entered upon a report of a referee.

William J. Kernan and *Francis Kernan* for appellant.

Wendell & Van Deusen for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

THE YATES COUNTY NATIONAL BANK, Appellant, v. MASON
L. BALDWIN, Respondent.

(Argued June 18, 1890; decided January 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of January, 1888, which affirmed a judgment in favor of defendant entered upon the report of a referee.

William T. Morris for appellant.

M. A. Leary for respondent.

Agree to affirm ; no opinion.

All concur, except POTTER, J., dissenting, and BRADLEY and HAIGHT, JJ., not sitting.

Judgment affirmed.

LAURA A. KNOWLES, Respondent, v. WILLIAM J. ERWIN,
Appellant.

(Argued October 6, 1890; decided January 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of January, 1887, which denied a motion for a new trial and ordered judgment absolute in favor

of plaintiff upon a verdict, exceptions having been ordered to be heard at first instance at General Term.

M. H. Peck for appellant.

Frederick W. Noyes for respondent.

Agree to affirm ; no opinion.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.
Judgment affirmed.

ISAAC HAMPTON, Appellant, *v.* MARTIN S. HAMSHER,
Respondent.

Certain town assessors, not knowing of the repeal, by the act of 1872 (Chap. 355, Laws of 1872), of the provision of the Revised Statutes (1 R. S. 389, § 4, as amended by chap. 287, Laws of 1871) directing that a farm or lot lying in two towns or wards shall, if occupied, be assessed in the town or lot where the occupant resides, assessed a farm owned and occupied by plaintiff as so prescribed, and the commissioner of highways of the town, in making his assessment for highway labor, assessed plaintiff for highway labor on his whole farm in compliance with the provision of the statute (1 R. S. 506, § 24) requiring him to make his apportionment upon real estate "as the same shall appear upon the last assessment-roll of the town." Plaintiff worked out the tax at the demand of the overseer of the highways, but protested against its legality. *Held*, that an action was not maintainable against the commissioner to recover the value of the labor so rendered by plaintiff; as that officer had jurisdiction to assess plaintiff and simply obeyed the command of a valid statute.

Reported below, 46 Hun, 144.

(Argued December 2, 1890; decided January 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 24, 1887, which reversed a judgment of the County Court of Livingston county, and affirmed a judgment of a justice of the peace.

This action was brought against defendant, who, as commissioner of highways, had apportioned highway labor upon the whole of the plaintiff's farm, only a portion of which lay in the town, to recover the value of the labor which plaintiff had performed under protest.

The following is the opinion in full:

"Section 4 of title 2 of chapter 13 of part 1 of the Revised Statutes was amended by chapter 287 of the Laws of 1871 so that it read as follows: '§ 4. When the line between two towns or wards divides a farm or lot, the same shall be taxed, if occupied, in the town or ward where the occupant resides; except when such town lines shall also be a county line, in which case each part shall be assessed in the town in which the same shall be situated, in the same manner as unoccupied lands are now assessed.' This section was repealed by chapter 355 of the Laws of 1872, and from that time there was no statute on this subject until 1886, when the section was re-enacted: '§ 4. When the line between two towns, wards or counties divides a farm or lot, the same shall be taxed, if occupied, in the town, ward or county where the occupant resides; if unoccupied, each part shall be assessed in the town, ward, village or county where the same shall lie.' (Chap. 315, Laws of 1886.)

"In 1884 and 1885, the plaintiff was a resident of the town of Ossian, and owned and occupied a farm, one half of which was in that town and the other half in the town of Nunda.

"In 1884, the assessors of the town of Ossian, not knowing of the repeal of section 4 by chapter 355 of the Laws of 1872, assessed the whole of the plaintiff's farm in that town for town, county and state taxes.

"Section 19 of title 1, chapter 16 of part 1 of the Revised Statutes provides: '§ 19. Every person owning or occupying land in the town in which he or she resides, and every male inhabitant above the age of 21 years, residing in the town when the assessment is made, shall be assessed to work on the public highways of the town, and the lands of non-residents situated in such town shall be assessed for highway labor as hereinafter directed.' Section 24 of the same chapter provides: '§ 24. In making such estimate and assessment, the commissioner shall proceed as follows: 1. The whole number of days' work to be assessed in each year shall be ascertained, and shall be at least three times the number of taxable inhabitants in such town. 2. Every male inhabitant above the age of twenty-one years (with certain exceptions) shall be assessed

at least one day. 3. The residue of such days' work shall be apportioned upon the estate, real and personal, of every inhabitant of such town, as the same shall appear upon the last assessment-roll of said town, and upon each tract or parcel of land, of which the owners are non-residents, contained in the lists made as aforesaid.'

"In 1885, the defendant was the sole commissioner of highways of Ossian, and he assessed the plaintiff for highway labor on his whole farm — three and one-half days being the proportion of that part situated in Nunda — and delivered the list to the overseer of the proper road district. This tax the plaintiff worked out at the demand of the overseer, but protested against its legality. It is agreed that the commissioner made the assessment, believing that he was bound to follow the town assessment-roll of the previous year, and also that he had jurisdiction to assess the plaintiff for highway labor, but it is asserted that the commissioner erred in apportioning any day's labor on account of that part of the farm situated in Nunda. The defendant having jurisdiction to assess the plaintiff and having apportioned the number of days' labor to be rendered according to the valuation of his estate as it appeared on the last preceding assessment-roll, as commanded by the 24th section of the statute, he is not liable to the plaintiff for the value of the labor rendered by him in satisfaction of the assessment. (*People ex rel v. Pierce*, 31 Barb. 138; *Trustees of the Village of Angelica v. Morse*, 56 id. 380.) The cause of the alleged erroneous assessment was the mistake of the assessors of the town, but the commissioner having obeyed the command of a valid statute, is not liable to this plaintiff in damages for the error of the assessors.

"The judgment should be affirmed, with costs."

J. B. Adams for appellant.

Charles J. Bissell for respondent.

Per Curiam opinion for affirmance.

All concur, BROWN, J., in result, except BRADLEY and HAIGHT, JJ., not sitting.

Judgment affirmed.

THOMAS M. PETERS, Respondent, *v.* GEORGE W. CARLETON,
Impleaded, etc., Appellant.

(Argued December 15, 1890; decided January 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 18, 1888, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Jam^{es} A. Deering for appellant.

John A. Beall for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

JULIA A. PERCIVAL, Appellant and Respondent, *v.* EDWARD
S. PERCIVAL, Appellant and Respondent.

Where an action by a wife for a judicial separation from her husband on the ground of abandonment is determined in her favor, the court has power as part of the final judgment, to make an allowance for the repayment of sums expended by plaintiff in her support and maintenance since the commencement of the action.

The General Term has power to review the judgment in this respect, and to strike out the allowance as improvidently made.

It seems, a General Term order striking out the allowance on the ground that the court below had no power to grant it, is error.

It must appear, however, from the order that the action of the General Term in striking out the allowance was based on the ground of want of power in the court below to authorize this court to review it; the opinion may not be resorted to to determine the grounds of the decision.

Beadleston v. Beadleston (108 N. Y. 402), distinguished.

(Argued December 15, 1890; decided January 22, 1891.)

CROSS-APPEALS from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 27, 1888, which modified, and affirmed as modified, a judgment entered upon a decision of the court

on trial at Special Term and also affirmed certain orders of the Special Term.

This was an action by a wife for a judicial separation from her husband on the ground of abandonment. The Special Term decided in her favor, and as part of the final judgment, awarded her \$300, for repayment of the sums expended by her for her support and maintenance since the commencement of the action. The General Term modified the judgment by striking out this allowance. Its order does not state the grounds for this modification.

The following is the opinion in full :

"The case of *Beadleston v. Beadleston* (103 N. Y. 402), upon which the General Term seems to have relied in deducting \$300 from the judgment of the Special Term, has no application to this appeal, because the subject there under review was an order made *pendente lite*, but after the referee had made his report which convicted the wife of adultery, although no judgment had been entered.

"This court held that the power of the Special Term, under those circumstances, was confined to such allowances as were necessary to enable the wife to 'carry on or defend the action,' and that there could be no necessity for an allowance to make a defense that had already been made. In this case the Special Term, as part of its final judgment of separation from bed and board in favor of the wife, awarded her \$300 'for repayment of the sums expended by her in her support and maintenance since the commencement of' the action. It was the duty of the defendant to support his wife, and as he failed to discharge that duty after suit was instituted against him, she was compelled to procure and expend money for that purpose. Upon the termination of the action, the court, in rendering judgment for the plaintiff, had the power to give 'such directions as the nature and circumstances of the case' required. The General Term had power to review the discretion exercised by the Special Term, and to strike out the \$300 as improvidently allowed under all the circumstances, but it had no right to do so upon the ground that the lower court had no power to allow it. (*Tilton v. Beecher*, 59 N. Y. 176.) In the case cited the order stated that it was made 'on the

ground that the court had no power to grant the same,' and, as we understand the rule, unless it appears in the record, of which the opinion forms no part, that the action of the court was based upon a want of power, we cannot review it. (*Titus v. Orvis*, 16 N. Y. 617, 618; *Tolman v. S., B. & N. Y. R. R. Co.*, 92 id. 353, 356.)

"It is a fundamental rule governing the review by one tribunal of the proceedings of another that orders or decisions resting in discretion are not reviewable. (*Wavel v. Wiles*, 24 N. Y. 635, 636.)

"The order of the General Term may have been made, so far as the record discloses, in the exercise of a conceded discretion, and if not, it was the duty of the appellant to procure it to be so settled as to show that it was not.

"We think that the judgment and all of the orders should be affirmed, without costs in this court to either party."

Wilder, Wilder & Lynch for appellant.

Raphael J. Moses, Jr., for respondent.

Per Curiam opinion for affirmance.

All concur.

Judgment and orders affirmed.

JOHN R. HINZ, as Administrator, etc., Appellant, *v.* JOHN H. STARIN, Respondent.

(Argued January 26, 1891; decided February 24, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made the second Monday of June, 1890, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Circuit.

Martin J. Keogh for appellant.

William W. Goodrich for respondent.

Agree to affirm; no opinion.

All concur, except BRADLEY, VANN and BROWN, JJ., dissenting.

Judgment affirmed.

In the Matter of the Final Accounting of **LeROY PARKER**, as Assignee of the Estate of **HENRY I. GLOWACKI**, under a General Assignment.

(Argued January 26, 1891; decided February 24, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 1, 1889, which modified, and affirmed as modified, a judgment of the County Court of Genesee county, rendered upon the final accounting of the appellant, as assignee.

LeRoy Parker appellant in person.

Henry F. Tarbox for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

In the Matter of the Accounting of **PHEBE C. HAVILAND**, as Executrix of the Will of **JOHN COCKS**, Deceased.

(Argued January 27, 1891; decided February 24, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 10, 1888, which modified, by reversing in part, a decree in the above matter of the surrogate of Westchester county.

Thomas Nelson for appellant.

James A. Hudson for respondent.

Agree to affirm; no opinion.

All concur, except **HAIGHT, J.**, not voting.

Judgment affirmed.

WILLIAM T. SCHACKELFORD, Respondent, v. ANN ELIZA MITCHELL et al., as Executors, etc., Appellants.

(Argued January 28, 1891; decided February 24, 1891.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made June 4, 1890, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

John E. Parsons for appellants.

Julien T. Davies for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

WILLIAM COLLINS, as Assignee, etc., Appellant, v. ELISHA W. HYDORN et al., Respondents.

(Argued January 29, 1891; decided February 24, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 26, 1890, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

George B. Wellington for appellant.

Charles E. Patterson for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

MARY E. MCCOLLUM, as Administratrix, etc., Appellant,
v. THE NEW YORK MUTUAL LIFE INSURANCE COMPANY,
Respondent.

(Argued January 29, 1891; decided February 24, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 1, 1889, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Circuit.

Joel L. Walker for appellant.

Robert Sewell for respondent.

Agree to affirm; no opinion.

All concur, except HAIGHT and BROWN, JJ., not sitting.

Judgment affirmed.

CAMILLIA G. TOWNS, as Administratrix, etc., Respondent, v.
THE ROME, WATERTOWN AND OGDENSBURG RAILROAD COM-
PANY, Appellant.

(Argued January 30, 1891; decided February 24, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 26, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

Edmund B. Wynn for appellant.

W. F. Porter for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

MARY E. CARROLL, as Executrix, etc., Respondent, v. JOHN CONLEY, Jr., Appellant.

(Submitted January 30, 1891; decided February 24, 1891.)

APPEAL from judgments of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 12, 1890, directing judgment in favor of plaintiff in a case submitted under section 1279 of the Code of Civil Procedure.

George R. Westerfield for appellant.

John Delahunty for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

JEREMIAH CALLAGHAN, as Administrator, etc., v. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Appellant.

(Argued February 2, 1891; decided February 24, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 11, 1890, which affirmed a judgment in favor of plaintiff and affirmed an order denying a motion for a new trial.

Louis Marshall for appellant.

M. E. Driscoll for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

LEMUEL COFFIN et al., Appellants, v. WILLIAM H. HOLLISTER, Jr.,
as Assignee, etc., Respondent.

In an action to recover possession of goods sold and delivered to defendants on the ground that the sale was induced by false and fraudulent representations made by them, the burden is upon the plaintiff to establish that such representations were made with intent to deceive and defraud.

(Argued February 3, 1891; decided February 24, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made December 11, 1889, which affirmed a judgment in favor of defendant entered upon the report of a referee.

This was an action of replevin to recover the possession of fifteen cases of muslins that had been sold by the plaintiffs to the firm of Toles & Pettit, manufacturers of shirts in the city of Troy.

The following is the *mem.* of opinion:

"On the 31st of October, 1881, the plaintiffs sold the goods in question to the assignors of the defendant upon a credit of sixty days from December 1, 1881, and on the 17th of January, 1882, they commenced this action to replevy the same upon the ground that they had been induced to sell and deliver their property by reason of certain false and fraudulent representations made by the purchasers. The burden of proof was upon the plaintiffs to establish that the alleged false representations were made by the vendees with intent to deceive and defraud. (*Nichols v. Pinner*, 18 N. Y. 295, 299; *Arthur v. Griswold*, 55 id. 400, 410; *Morris v. Talcott*, 96 id. 100; *Macullar v. McKinley*, 99 id. 353, 358; *Brackett v. Griswold*, 112 id. 454, 467.)

"The learned referee before whom the action was tried, found that certain material representations were made, but he did not find that they were made with intent to defraud and he refused to find that they were false. On the other hand, he found that the defendant, as assignee, was the actual owner of the goods when this action was commenced, and that no facts ever existed that authorized the plaintiffs to rescind the sale or to

have the same declared fraudulent and void. These findings have been expressly approved by the General Term, which states in its opinion that the referee's report is justified by the evidence. The only ground upon which we are asked to reverse the judgment appealed from is that the referee erred in passing upon the facts. We are unable, however, to review his conclusions in this regard, because the questions of fact rest upon a conflict of evidence and are thus protected from interference by us, even if we were of the opinion that they should have been otherwise determined. (*Healy v. Clark*, 120 N. Y. 642; Code Civ. Pro. §§ 992, 993, 1337.) When the result depends, as it did in this case, upon the credibility of witnesses, the facts found by the trial court and approved by the General Term are final and unchangeable for the purpose of an appeal to this court. This is often said, but oftener disregarded, and the result is many fruitless appeals.

"The judgment should be affirmed, with costs."

R. A. Parmenter for appellants.

Nelson Davenport for respondent.

VANN, J., reads for affirmance.

All concur.

Judgment affirmed. _____

EMELINE BOWERS, Appellant, *v.* WILLIAM C. SMITH et al.,
as Executors, etc., Respondents.

(Argued February 3, 1891; decided February 24, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made December 12, 1888, which affirmed a judgment in favor of defendants entered upon the report of a referee.

W. Frothingham for appellant.

Edwin Countryman for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

In the Matter of the Probate of the Last Will and Codicil of
JANE K. AGAR, Deceased.

(Argued February 4, 1891; decided February 24, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 1, 1889, which affirmed a decree of the surrogate of the county of Erie admitting the said will and codicil to probate.

Frank C. Ferguson for appellant.

J. Newton Fiero for respondent.

Arthur W. Hickman, guardian *ad litem*, for infant legatee.

Agree to affirm; no opinion.

All concur, except PARKER, J., not voting.

Judgment affirmed.

ANN FARMER, as Administratrix, etc., Respondent, v. THE
EMIGRANT INDUSTRIAL SAVINGS BANK et al., Appellants.

(Argued February 2, 1891; decided March 8, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 23, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

Francis C. Devlin for appellants.

Abram Kling for respondent.

Agree to affirm on authority of *Devlin v. Greenwich Savings Bank* (125 N. Y. 756).

All concur.

Judgment affirmed.

GEORGE DINTREUFF, an Infant by Guardian, etc., Respondent,
v. THE ROCHESTER CITY AND BRIGHTON RAILROAD COMPANY,
Appellant.

(Argued February 4, 1891; decided March 3, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 25, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

Thomas Raines for appellant.

Walter S. Hubbell for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

THOMAS HOGAN, as Administrator of JOHN HOGAN, Deceased,
Respondent, v. THE CENTRAL PARK, NORTH AND EAST
RIVER RAILROAD COMPANY, Appellant.

(Argued February 4, 1891; decided March 3, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made November 7, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

The following is the opinion in full:

"This action was begun February 10, 1888, to recover, under section 1902 of the Code of Civil Procedure, damages of the defendant for having, as it is alleged, on the 18th day of August, 1887, negligently caused the death of the plaintiff's son, a lad twelve years old. At the date of the accident the defendant owned and operated a surface railroad in Fifty-ninth, and in other streets in the city of New York, using in part cars drawn by one horse and managed solely by a driver. About nine o'clock in the evening of August eighteenth, the decedent and several boys not intending to pay their fares got

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onto the rear platform of one of defendant's cars then going west in East Fifty-ninth street, and between First and Second avenues. Before the car reached Second avenue all of the boys, at the command of the driver, left it, except the decedent, who sat on the south or left side of the rear platform. As the car crossed Second avenue, Frank Ribarvarro, a lad fifteen years old, got onto the north or right side of the same platform for the purpose of having a free ride. When the car was about opposite No. 224 East Fifty-ninth street the driver started to go towards the rear platform for the purpose of compelling the boys to leave the car, but before he reached them they jumped off, Ribarvarro on the north and the decedent on the south side, the latter falling under one of the defendant's cars running east on the other track and was killed. It is not asserted that the driver touched either boy, but it was testified that he went towards them in a threatening manner and so terrified them that they jumped off in the manner described, and it is alleged that the defendant's driver negligently caused the accident. Whether he threatened the lads with bodily harm was contested on the trial, and the question of liability was held to turn upon the decision of that question of fact. The jury was instructed: 'If you believe from the evidence that this driver advanced in a menacing manner upon these boys at that instant, and impressed himself, or manifestly was likely to impress upon their minds the fact that they were in danger of assault, no matter how little from him in his effort to drive them, and chiefly the deceased boy, from the car, why then, so far, that would be an element that would warrant you in coming towards the conclusion that the driver of the car was negligent in his conduct towards the deceased boy.' To this instruction the defendant excepted and requested the court to charge: 'If the jury believe that the plaintiff's intestate was stealing a ride on defendant's car, and that the driver intended no personal injury to the plaintiff's intestate, but ordered him off and made a feint as if to go and put him off, because he believed it to be the least harmful mode of removing him, the defendant is not liable.' The court declined to charge on this subject otherwise than it had, and the defendant excepted. Thereupon the defendant requested the

court to charge: 'If the boy's want of care in jumping off the car, was the cause of the injury, then he was guilty of contributory negligence, and the plaintiff cannot recover.' The court refused so to charge, and the defendant excepted. Testimony had been given tending to show that the car which the decedent jumped or fell in front of could have been seen by him for some little time before the accident. It was also testified that the driver did not let go of the lines with which he managed his horse—did not approach within several feet of the boys; nor threaten them with violence. The evidence being sufficient to have authorized the jury to find that the decedent negligently and unnecessarily jumped towards or in front of the moving car, it was error for the court to refuse the request last above quoted, for which a new trial must be granted.

"This case is quite different from *Clark v. N. Y., L. E. & W. R. Co.* (40 Hun, 605; affd. 113 N. Y. 670), in which case there was no conflict of evidence. The defendant called no witnesses, and it was established beyond dispute that the plaintiff was driven from the steps of the moving caboose on a steam railroad by an assault of the defendant's employees.

"In the course of the charge, several expressions were let fall well calculated to excite prejudice and hostility in the minds of the jury towards the defendant and sympathy for the plaintiff, which had not a tendency to induce a deliberate and impartial consideration and determination of the issues between the parties, and we think the remarks referred to quite sufficient to have justified the General Term in granting a new trial because of them. (*Hamilton v. Third Avenue Railroad Co.*, 53 N. Y. 25; *Standard Oil Co. v. Amazon Ins. Co.*, 79 id. 506; Baylies on New Trials & Appeals, 125.)

"The judgment should be reversed and a new trial granted, with costs to abide the event."

Henry Thompson for appellant.

Daniel P. Hays for respondent.

FOLLETT, Ch. J., reads for reversal and new trial.

All concur, HAIGHT and BROWN, JJ., in result, except BRADLEY, J., dissenting.

Judgment reversed.

LOUIS GRIESHEIMER, as Assignee, etc., Appellant, v. MOSES
TANENBAUM et al., Respondents.

An account-book is only evidence of sales and dealings in the ordinary course of business, and not of a special contract under which a party claims to have paid a claim against him by crediting it upon an account he has against another party.

A party to a contract, the terms of which are in dispute, may not give in evidence his own statements, either oral or written, made subsequent to the contract in corroboration of his version of it.

(Argued February 6, 1891; decided March 8, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of October, 1889, which affirmed a judgment in favor of plaintiffs entered upon a verdict.

This action was brought to recover the price of a bill of goods sold by plaintiff's assignors to the defendants. There was no question in relation to the price, amount or delivery of the goods. The only question was whether the goods were to be paid for in cash by the defendants, or by applying the price of them as a credit upon a bill for a larger amount which the defendants had against another firm, of which one of the plaintiff's assignors was a partner.

There was a plain contradiction between the oral testimony of the plaintiff's assignors and the defendants as to the existence of an agreement in respect to the mode of payment.

The defendants were allowed to introduce, as evidence to support their contention, an entry upon their ledger over an objection and exception by the plaintiff. The entry was upon a page of defendants' ledger, bearing their account with the firm of the third party (of which one of the plaintiff's assignors was a member), and was as follows: "August 29th, by Merchandise, Oct. 1-6-30 \$2226.50." There was proof that there was an entry respecting this matter in pencil in a book of original entries. That book was not produced upon the trial, though its existence and probable whereabouts were proved. There was no proof that either of the assignors of plaintiff or that any of the members of the firm of the third party was present at the making of the entry in the book of

original entry or in the ledger of the defendants, or had ever seen or been informed of such entries.

The goods in question were received by the defendants about the 2d day of September, 1884. The evidence did not show when these entries were in fact made other than may be inferred from the entry itself. The evidence showed that the entry in the ledger was not a copy of the entry in the book of original entry.

The following is the opinion in full :

"We think the learned trial judge committed an error in the admission of the entry upon the defendants' ledger as evidence.

"There is and can be no pretence, it seems to me, that an entry in the ledger was admissible under the rule allowing the account-book of a party as evidence in his favor, for the reasons that the evidence in this case shows that the original entry was upon another book, and an account-book is only evidence of sales and dealings in the ordinary course of business, and not of special contracts of the character of the one in this case under which a party claims to have paid a claim against him by crediting such claim upon an account he has against another party. (*In re McGoldrick v. Traphagen*, 88 N. Y. 334.) Besides the evidence shows the entry in the ledger is not a copy of the entry in the book of original entry, but is a 'totalling' of it, whatever that may be. Nor is it suggested in the opinion of the learned General Term in affirming the judgment that the entry in the defendants' ledger was a part of the *res gestæ* between the parties to the action. Upon the contrary, it is assumed in the opinion of that court, that the entry was not a part of the *res gestæ*.

"But in that opinion the ruling of the trial court is approved upon the ground that the entry shows that 'the defendants did as they agreed and, in fact, did offset the price by crediting the third party's account with the purchase-price' of the goods in question. The question upon this appeal is, therefore, brought to this, whether a party to a contract, the terms of which are in dispute, may give in evidence his own statements, either oral or written, made subsequent to the contract in corroboration of his version of the contract?

"The question is not whether the defendants had performed the contract, but what the contract was, and as to the defendants' right to perform it in the manner pursued by them.

"The general rule is that such statements and entries are inadmissible for any purpose. There was no pretence that the defendants could not recollect the terms of the contract and so reference to contemporaneous memoranda might be resorted to to refresh a dull or defective memory. The rule in such case is limited to an original entry made by the witness at the time of the transaction. For the general rule and the exceptions to it see opinion of this court by Judge BRADLEY, 114 N. Y. 280, and the cases there cited.

"The entry in the ledger of defendants was not the book of original entry, nor made at the time of the transaction, nor made by the witness who testified in relation to it. It seems to me that it would be a somewhat novel, not to say dangerous rule of evidence, upon a trial to determine a dispute as to what the contract between the parties is, to allow one of the parties to testify that he had performed it in harmony with his testimony as a witness.

"But the case under consideration goes much further than that. It allows the party to show in corroboration of his testimony, flatly contradicted by the other party to the disputed contract, not the actual performance of the disputed contract, but a performance upon paper by an entry made subsequently to the contract by himself or under his direction, upon his own books, of the way and manner he intends or hopes to perform it; for the entry of a credit upon the books of one party in his accounts with another party is not the performance of a contract. It is the actual adjustment and settlement of the entry upon the book that can constitute performance. Until actual application and settlement, the entry upon the books of a party signifies nothing more than that party's understanding or wish as to the mode of performance.

"The settlement or the performance of the contract between the parties in this case required the assent of the plaintiff's assignors, and the assent of the third party who owed defendants, that the debt might be paid in this way and that the

third party thereby become the debtor to the plaintiff before the contract, as claimed by the defendants, could be performed.

"No such assent or action was shown, and the entry upon the defendants' books signifies nothing in the way of actual performance of the contract.

"I think the judgment should be reversed and a new trial granted, with costs to abide the event."

Thomas Raines for appellant.

Theodore Bacon for respondents.

POTTER, J., reads for reversal and new trial.

All concur, except BRADLEY, HAIGHT and BROWN, JJ., dissenting.

Judgment reversed. _____

CATHARINE B. PITT, as Administratrix, etc., Appellant, v.
CHARLES KELLOGG, Respondent.

(Argued February 23, 1891; decided March 10, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 15, 1890, which affirmed an order setting aside a judgment in favor of plaintiff and granting a new trial.

Horace Secor, Jr., for appellant.

George H. Fletcher for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed. _____

In the Matter of the Accounting of PHILIP R. UNDERHILL,
as Administrator, etc., Respondent, ELIZABETH R. GUION,
Appellant.

(Argued February 25, 1891; decided March 10, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 18, 1890, which affirmed a decree of the surrogate

of the county of Westchester dismissing the petition in the above entitled matter.

Alex. Thain for appellant.

A. R. Dyett for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed. _____

JOHN MITCHELL, as Executor, etc., Respondent, *v.* DAVID
H. KNAPP, Executor, etc., Impleaded, etc., Appellant.

(Argued February 26, 1891; decided March 10, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 26, 1889, which affirmed a judgment construing the will of Mary E. Griffin, deceased, entered upon a decision of the court on trial at Special Term.

George W. Ray for appellant.

Howard D. Newton for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

HIRAM MILLER, Respondent, *v.* HENRY R. PIERSON, as
Survivor, etc., et al., Appellants.

ARGUED and decided with *Durant v. Pierson* (*ante*, p. 444).

THOMAS RYAN, as Administrator, etc., Appellant, *v.* THE
LONG ISLAND RAILROAD COMPANY, Respondent.

(Argued February 25, 1891; decided March 17, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order

made December 18, 1889, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Circuit.

Thomas Young for appellant.

E. B. Hinsdale for respondent.

Agree to affirm; no opinion.

All concur, except BRADLEY, J., not voting and BROWN, J., not sitting.

Judgment affirmed. _____

MARGARET RIORDAN, as Administratrix, etc., Appellant, v.
THE OCEAN STEAMSHIP COMPANY, of Savannah, Georgia,
Respondent.

In an action to recover damages for the alleged negligent killing of R., plaintiff's intestate, it appeared that he was in defendant's employ, engaged in tiering up freight in the hold of one of its vessels and received the injuries which caused his death, while coming up from the hold on an elevator used in the work, by being caught between the elevator and the combing of the hatch. There was room enough upon the elevator for him to stand without being exposed to danger, and there was no evidence from which it could be inferred that he used the precautions of a prudent man. At the request of the plaintiff's counsel the court charged that "if the deceased was rightfully on the elevator at the time of his injury, in the absence of the testimony of an eye witness of the accident, the jury may assume that he received his injury in the performance of his duty and had not omitted the precautions which a prudent man would take in the presence of known danger." *Held*, error.

Galvin v. Mayor, etc. (112 N. Y. 228), distinguished.

(Argued February 27, 1891; decided March 17, 1891.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made June 16, 1890, which reversed a judgment in favor of plaintiff entered upon a verdict and granted a new trial.

The following is the opinion in full:

"This action was brought to recover damages for the death of the plaintiff's intestate.

"On the 31st day of January, 1888, Michael Riordan, the deceased, was engaged, as a servant of the defendant, in tier-

ing up freight in the hold of the steamship 'Chattahoochee,' in the city of New York. The freight was let down into the hold by an elevator which was worked by a winch. The winch was set in motion and stopped by means of a lever operated by a man who stood by its side. He got his word to raise the elevator from the men in the hold who discharged the freight therefrom. In the hold there was a light, with a large reflector behind it, opposite the elevator. The elevator had just descended into the hold of the vessel with a load of freight as the call for dinner was given. The four men in the hold thereupon got upon the elevator and gave the word to hoist. The man at the winch pulled the lever, but could not raise the elevator for the reason that it was so heavily loaded. He thereupon told them to remove the freight. They then took off all the freight but two barrels, and three of them again got upon the elevator, and the deceased gave the word to hoist. The elevator commenced to ascend slowly and had gone a distance of about seven feet when a cry to stop was raised. Thereupon the elevator was immediately stopped by the winchman, and Riordan was discovered to be caught between the elevator and the combing of the hatch. He was then released and with the elevator brought up to the deck of the vessel. His injuries were of that character that he soon thereafter died. The deceased had been in the service of the defendant for over eight months. The platform of the elevator was about seven feet in length and five in width, and with the two barrels on it there was ample room for all of the men to stand upon it and be clear of the hatch.

"Two of the men, who were with Riordan in the hold of the vessel at the time that he was caught, were called as witnesses on the trial, and they testified that they could not tell what position he was in on the elevator, or where he was standing at the time that he was caught; that they were standing near the middle of the elevator, and the first that they noticed of him was after he was caught. No evidence was given tending to show how he came to be outside of the edge of the platform of the elevator so as to be caught under the combing of the hatch. We are thus left in ignorance as to the cause of the accident.

"The question of his contributory negligence had consequently become important, and was sharply litigated. Thereupon and at the conclusion of the trial the plaintiff requested the court to charge that 'if the deceased was rightfully on the elevator at the time of his injury, in the absence of the testimony of an eye witness of the accident, the jury may assume that he received his injury in the performance of his duty, and had not omitted the precautions which a prudent man would take in the presence of known danger.' This request was granted by the court, and an exception was taken by the defendant.

"There is no question but that Riordan had the right to be upon the elevator; that he was in the employ of the defendant, and was injured whilst in the discharge of his duty as such employe. The vice in the charge is that the instruction authorized the jury to assume, in the absence of the testimony of an eye witness, that Riordan had not omitted the precautions which a prudent man would take in the presence of known danger, thus permitting the plaintiff to establish her cause of action without evidence. We do not understand such to be the law.

"The plaintiff, in support of his request, relies upon the case of *Galvin v. Mayor, etc.* (112 N. Y. 223). In that case the plaintiff's intestate was engaged as driver of a cart delivering coal at the court-house. There was a heavy iron grating used to cover a hatchway in the sidewalk leading to the basement of the court-house, through which the coal was delivered. The grating hung upon hinges and was thrown back against the building, but was not fastened as it should have been. It fell upon him, causing his death. No person saw the grating at the instant it fell. Evidence was offered and excluded by the trial court to show that by the known and established mode of doing the business the deceased was called upon, in the performance of his duty, to go into the basement through the hatchway, to procure the signature of some official to a ticket showing the delivery of the load of coal. It was held, Chief Judge RUGER delivering the opinion of the court, that this evidence was competent, and had it been received the

inference might have been properly drawn from the facts and circumstances surrounding the case that the deceased was in the discharge of his duty in the place where he received his injuries, and had not omitted the precautions a prudent man would take in the presence of known danger.

“A very different question was there involved from the one here under consideration. In that case the grating was raised and not fastened as it should have been. It was left standing in a dangerous condition, without the knowledge of the deceased. It was his duty to enter the basement and get a receipt for the delivery of his load of coal, and whilst in the discharge of this duty the grating fell upon him, causing his death. These are the inferences which might properly be drawn from the evidence had it not been excluded, and under these facts he had the right to suppose that the grating was securely fastened, and that he was not, therefore, guilty of contributory negligence. But whilst inferences may properly be drawn from the surrounding facts and circumstances, it does not follow that we may assume facts not proven. Between the two propositions, the one presented by the case referred to, and the other by the charge excepted to, there is a wide difference. One is an inference drawn from facts; the other is an assumption without facts.

“In the case of *Dobbins v. Brown* (119 N. Y. 188), the same judge who delivered the opinion in the *Galvin* case says that ‘Any inference that the accident happened in the manner suggested would, it seems to us, have been substituting conjecture for proof, and violate the rule requiring proof always to be made the basis for a recovery;’ and again, he says: ‘Whatever might have been the cause of death, it was for the plaintiff to show how it occurred. The burden of proof lay upon her to establish the liability of the defendants, and to do this she was bound to show affirmatively not only the absence of contributory negligence on the part of her intestate, but the negligence of the defendant with respect to some matter which caused the injury complained of.’

“We are not permitted to guess or assume that the deceased was free from fault because he was injured, or that every person will take care of himself from regard to his own life

and safety, for the reason that human experience shows that persons exposed to danger will frequently forego ordinary precautions of safety. It is incumbent upon the plaintiff to show, by a preponderance of evidence, such facts and circumstances as will satisfy the minds of the jurors that the deceased exercised proper care and prudence, and did not omit the precautions of a prudent man under the circumstances. The law demands proof and not mere surmises. (*Bond v. Smith*, 113 N. Y. 378; *Cordell v. N. Y. C. & H. R. R. Co.*, 75 id. 330; *Reynolds v. N. Y. C. & H. R. R. Co.*, 58 id. 248; *Hoag v. N. Y. C. & H. R. R. Co.*, 111 id. 199.)

"It is claimed that the defendant was not prejudiced by the charge. That it was made at the close of the case, and probably did not produce the slightest impression on the minds of the jurors. We cannot, however, assume this to be so, for without the presumption there was no sufficient evidence to justify the verdict. As we have already seen, it does not appear how or in what manner Riordan came to be caught between the elevator and the hatch; whether or not he had exercised the precautions of a prudent man does not appear, and there are no sufficient facts from which it can be inferred. He had light so that he could see the elevator; there was plenty of room thereon on which he could select his own place to stand; as it was ascending to the deck of the vessel it was approaching the light of noon-day; the elevator raised slowly at its ordinary speed; the apparatus was safe and in perfect order, and had he not in some unexplained manner got outside of the platform of the elevator he would not have been injured. It consequently follows that it was only by presuming that he had not omitted the precautions of a prudent man that the verdict upon this branch of the case could be sustained.

"But again, there is no claim that there was any defect in the machinery or in the operation of the elevator. It was in order, and the manner of its operation was well known and understood by the deceased. The only claim of negligence on the part of the defendant is that it neglected to have a gangwayman to stand at the hatchway and give the signals to the winchman to raise and lower. It is not, however, claimed that the hoisting of the elevator was done at an improper time or

that the starting was the proximate cause of the injury. On the contrary it affirmatively appears that Riordan himself gave the signal to hoist. It is not, therefore, apparent how the presence of a gangwayman would have prevented the accident unless he could have seen down the hatchway of the elevator and observed the position of Riordan in time to stop it before the injury was inflicted. We do not understand that the master is charged with the duty of employing a servant to watch another servant when he is riding upon an elevator. It does not, therefore, appear that the injury was the result of any negligence on the part of the defendant.

"The order should be affirmed and judgment absolute ordered against the appellant upon the stipulation."

George William Hart, Jr., for appellant.

William N. Cohen for respondent.

HAIGHT, J., reads for affirmance.

All concur.

Order affirmed and judgment accordingly.

EMMA M. HOWARTH, Respondent, *v.* JOHN H. HOWARTH, as
Administrator, etc., Appellant.

(Argued February 27, 1891; decided March 17, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made September 9, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

S. M. Lindsley for appellant.

A. M. Beardsley for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

In the Matter of Proving the Last Will and Testament of
CHARLOTTE BENNETT, deceased.

(Argued February 27, 1891; decided March 17, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made June 29, 1889, which affirmed a decree of the surrogate of Westchester county admitting to probate the last will and testament of Charlotte Bennett, deceased.

Francis Larkin for appellant.

Lent & Herrick for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

HERMAN BEECKEL, as Administrator, etc., Appellant, v. THE
IMPERIAL COUNCIL OF THE ORDER OF UNITED FRIENDS,
Respondent.

(Argued February 27, 1891; decided March 17, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department in favor of defendant, entered upon an order made November 7, 1890, which sustained exceptions ordered to be heard at first instance at General Term and set aside a verdict in favor of plaintiff directed by the court and dismissed plaintiff's complaint.

W. A. Sutherland for appellant.

Alfred Steckler for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

JOHN W. GIBSON, as Executor, etc., et al., Respondents, v. ANNA
McLAWRY et al., Appellants.

(Argued March 2, 1891; decided March 17, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 29, 1890, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

George Ade for appellants.

Edwin D. Wagner for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

RICHARD FARMAN, Respondent, v. THE TOWN OF ELLINGTON,
Appellant.

(Submitted March 4, 1891; decided March 17, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 21, 1887, which affirmed a judgment in favor of plaintiff entered upon a verdict.

Wm. H. Henderson for appellant.

A. C. Wade for respondent.

Agree to affirm; no opinion.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.

Judgment affirmed. _____

MICHAEL O'GORMAN et al., Respondents, v. THE NATIONAL
FIRE INSURANCE COMPANY, Appellant.

(Submitted March 5, 1891; decided March 20, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order

made April 29, 1890, which affirmed a judgment in favor of plaintiffs entered upon a verdict and affirmed orders denying a motion for a new trial and a motion for an order of reference.

P. W. Cullinan for appellant.

J. R. O'Gorman for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

In the Matter of the Last Will and Testament of RICHMOND
SIMMONS, Deceased.

(Argued March 5, 1891; decided March 20, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made March 25, 1890, which affirmed a decree of the surrogate of Ontario county revoking the probate of the will of Richmond Simmons, deceased.

A. P. Rose for appellant.

Edwin Hicks for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

In the Matter of the Probate of the Will of JOHN CONNOR,
Deceased.

(Argued March 5, 1891; decided March 20, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 2, 1889, which affirmed a decree of the surrogate of New York county admitting a paper to probate as the last will and testament of John Connor, deceased.

Aaron Pennington Whitehead for appellant.

Frederic R. Coudert for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

AUGUSTUS A. LEVEY, as Trustee, etc., et al., Appellants, v.
UNION PRINT WORKS, Respondent.

(Argued March 9, 1891; decided April 7, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 8, 1890, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

George W. Wingate for appellants.

John H. V. Arnold for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

ALFRED H. SMITH et al., Respondents, v. HENRY CLEWS,
Appellant.

(Argued March 10, 1891; decided April 7, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 29, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

Albert A. Abbott for appellant.

Charles H. Woodbury for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Respondent, *v.* JOHN M. BURKARD et al., Appellants.

(Argued March 10, 1891; decided April 7, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 1, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

William F. Cogswell for appellants.

William Nottingham for respondent.

Agree to affirm; no opinion.

All concur, except BRADLEY, J., dissenting, and HAIGHT, J., not voting.

Judgment affirmed. _____

JOHN PETERSON, Appellant, *v.* JOHN SWAN, Respondent.

(Argued March 11, 1891; decided April 7, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 27, 1890, which affirmed a judgment in favor of defendant entered upon a verdict directed by the court.

George H. Hart for appellant.

Joseph A. Shoudy for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

In the Matter of the Final Judicial Settlement of the Accounts of BREWSTER J. ALLISON, et al., as Executors, etc.

(Argued March 11, 1891; decided April 7, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an
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order made December 8, 1890, which affirmed a decree of the surrogate of Rockland county, settling the accounts of the petitioners.

Calvin Frost for appellant.

Garrett Z. Snider for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

JANE HIGGINS, as Administratrix, etc., Respondent, v. THE
VILLAGE OF GLENS FALLS, Appellant.

(Argued March 12, 1891; decided April 7, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made September 25, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

Richard L. Hand for appellant.

J. S. L'Amoreaux for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

ISAAC M. ADAMS, Appellant, v. CHARLES M. SPEELMAN,
Respondent.

(Argued March 13, 1891; decided April 7, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, in favor of defendant, entered upon an order made the first Tuesday of June, 1890, which affirmed an order denying a motion for a new trial and directed a judgment upon a verdict.

William F. Cogswell for appellant.

Charles S. Baker for respondent.

Agree to affirm ; no opinion.

All concur, except PARKER, J., not sitting.

Judgment affirmed.

LIZZIE GUIBERT, Respondent, *v.* CARRIE P. SAUNDERS et al.,
Respondents, WILLIAM B. WHITMAN et al., Appellants.

(Argued March 16, 1891; decided April 7, 1891.)

APPEAL, under section 1336 of the Code of Civil Procedure, from final judgment in favor of plaintiff, entered upon the report of a referee after an affirmance by the General Term of the Supreme Court in the first judicial department, by order made the first Monday of January, 1884, of an interlocutory judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Edwin Countryman for appellants.

James M. Hunt for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JAMES B. TITMAN, as Administrator, etc., et al., Respondents, *v.*
THE TWELFTH WARD BANK, Impleaded, etc., Appellant.

(Argued March 16, 1891; decided April 7, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 29, 1889, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Wheeler H. Peckham and *J. Newton Fiero* for appellant.

L. Laflin Kellogg for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

HELEN S. WRIGHT, Respondent, v. THE SYRACUSE, BINGHAM-
TON AND NEW YORK RAILROAD COMPANY, Appellant.

(Argued March 18, 1891; decided April 7, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made September 18, 1888, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

Louis Marshall for appellant.

John A. Collier Wright for respondent.

Agree to affirm; no opinion.

All concur, except FOLLETT, Ch. J., not sitting.

Judgment affirmed.

GEORGE T. NEWHALL, Respondent, v. WILLIAM H. APPLETON
et al., Appellants.

Where incompetent evidence has been admitted on the trial of an action and it affirmatively appears from the opinion below that it was relied on in deciding a material issue, its admission cannot be regarded as a harmless error and will be sufficient ground for the reversal of a judgment.

Defendants contracted to pay plaintiff for orders obtained for certain serial publications. In an action upon the contract, one H., who had been employed by plaintiff as an assistant under a contract expressed in the same terms, was permitted to testify, under objection, as to what he understood the language used entitled him to receive. A judgment in favor of plaintiff was rendered and the referee, in his opinion, referred to the evidence as corroborative of plaintiff's understanding of the contract. *Held*, that the evidence was incompetent, and its reception error, requiring a reversal.

Defendants claimed that the orders referred to meant orders given by persons accepting and paying for the whole or some part of the work subscribed for, and did not include those given by persons who refused to take and pay therefor in whole or in part. The referee allowed plaintiff to prove that many subscribers failed to perform their contracts by reason of defendants' delay in making delivery. *Held*, no error.

Reported on former appeals, 102 N. Y. 183; 114 id. 140.

(Argued March 19, 1891; decided April 7, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 27, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The following is the opinion in full:

"D. Appleton & Co. were the publishers of Picturesque Europe, Picturesque America, Turner's Gallery, the American Cyclopedia and the Condensed Cyclopedia. The first two mentioned works were each issued in about sixty monthly parts at fifty cents a number. Turner's Gallery was issued in about fifty monthly parts at the same price per number. The American Cyclopedia consisted of sixteen, and the Condensed Cyclopedia of four volumes, the latter being sold, bound, at \$7.50 per volume, and in parts at fifty cents a number.

"Between December 20, 1877, and May 20, 1878, the plaintiff was engaged under an oral contract with D. Appleton & Co. in procuring subscribers for these works in the states of Louisiana and Texas. The plaintiff alleges that by the terms of the oral contract he is entitled to receive \$15 for every order obtained for the American Cyclopedia, \$6 for every order for a bound set of the Condensed Cyclopedia and \$4 for every order for the other publications. The defendants contend that by the terms of their contract the plaintiff was entitled to receive \$15 for every *bona fide* subscriber for the American Cyclopedia who should accept and pay for five volumes of that work, or \$20 for each subscriber who should receive and pay for a whole set at one time, \$6 an order for the Condensed Cyclopedia delivered in bound volumes or \$3.50 when delivered in parts, and \$4 each for every *bona fide* order for any one of the serials when ten parts had been accepted and paid for. The defendants also contended before the referee and asked him to find that the words "order" and "subscription," as between publishers and canvassers, meant when used as a basis of the latter's compensation, orders or subscriptions given by persons accepting and paying for the whole or some part of the work subscribed for and did not include those given by irresponsible persons who refused to take and pay for a whole or any part of it. The referee found that the plaintiff obtained the following orders:

18 for the American Cyclopedia, for which he was entitled to \$15 each.....	\$270
6 for bound sets of the Condensed Cyclopedia, for which he was entitled to \$6 each.....	36
515 for Turner's Gallery, Picturesque Europe and Picturesque America, for which he was entitled to \$4 each	2,060
Total.....	\$2,366
The plaintiff has been paid.....	865
Due plaintiff, with interest from June 1, 1878.....	<u>\$1,501</u>

"While prosecuting the business, the plaintiff employed one Holbrook as an assistant, under a contract expressed in the same words as the contract which the plaintiff claims to have made with the defendants. Holbrook was called as a witness in behalf of plaintiff and permitted to testify over defendants' objection and exception that he understood the language employed to entitle him to receive \$4 for every signature obtained by him to the serials above mentioned. By allowing this witness to declare his understanding of his rights under his contract with the plaintiff he was permitted to testify to the legal effect of the one between the parties to this action, which was clearly incompetent. Whether the plaintiff's or the defendants' version of the contract was correct was a sharply-litigated question of fact, upon the determination of which the learned referee rested his decision of the case, and in his opinion, he referred to this evidence of Holbrook as corroborative of that of the plaintiff. When it affirmatively appears by the opinion that incompetent evidence was relied on in deciding a material issue, its admission cannot be held to be a harmless error. (*Woodgate v. Fleet*, 44 N. Y. 1, 14, 20.)

"The referee did not err in permitting the plaintiff to prove that many of the subscribers failed to perform their contracts by reason of the defendants' delay in making deliveries. This evidence was not relevant upon the issue as to what the contract was, nor as to the meaning of the words "order" or

"subscription," but had the referee taken the defendants' view of the contract or of the meaning of those words, it would have become competent to show that many of the subscriptions which the plaintiff obtained and forwarded to the defendants became worthless by their neglect to deliver the works as agreed with the subscribers.

"The judgment should be reversed and a new trial granted, costs to abide the event."

Edward Winslow Paige for appellants.

Wm. W. Badger for respondent.

FOLLETT, Ch. J., reads for reversal.

All concur.

Judgment affirmed.

JOHN J. P. READ, Respondent, *v.* THE BANK OF ATTICA,
Appellant.

124	671
136	482
124	671
172	294
172	297

Where a certificate of deposit issued by a bank contained no provision for the payment of interest, *held*, that in an action thereon against the bank testimony of an oral agreement made by the bank at the time of the deposit to pay interest was incompetent.

Reported below, 55 Hun, 154.

(Argued March 5, 1891; decided April 14, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made December 30, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court.

This action was brought to recover a sum of money deposited by plaintiff with defendant, with interest from the date of the deposit.

The following is the opinion in full:

"We agree with the court below in all respects save one. The admission of parol testimony tending to show an agreement by the defendant to pay interest was error, because its purpose was to vary the terms of the certificate of deposit, which was as follows:

'\$4,152.64. BANK OF ATTICA, STATE OF NEW YORK. }
BUFFALO, *March* 25, 1879. }

' J. J. P. Read has deposited in this bank forty-one hundred and fifty-two $\frac{44}{100}$ dollars, payable to the order of J. J. P. Read on return of this certificate.

‘W. K. ALLEN, *Cashier,*

'J. W. SMITH, *Teller.*'

“Had the plaintiff, after receiving the certificate, made a demand for payment, and the defendants, in order to secure the use of the money for a longer period, had promised to pay interest thereon, the plaintiff consenting, it is not questioned but such agreement could have been proven and enforced. But we do not understand the record before us to present such a situation. On the contrary, the writing and the alleged oral agreement appear to have constituted one transaction. The testimony on that subject is as follows: The plaintiff testified that after the certificate had been handed to him by Allen (the cashier), he had a conversation as to the bank paying interest on the deposit. Allen told him the deposit would bear three per cent interest if left for any length of time. Defendant’s cashier testified, on direct examination, that after the certificate of deposit was made out and delivered he had some conversation with plaintiff in regard to the interest; the understanding was that the certificate should bear interest at three per cent. On cross-examination he was asked: ‘Are you in the habit of making a private arrangement that certificates should bear interest and not note it in the certificate?’ He answered: ‘No, sir; my intention was to have written in there the rate of interest that we agreed to allow him. The conversation was this — when I handed him the certificate he says: You are to allow me interest on this, are you? I said: You are a man pretty flush in money, and you ought not to ask interest of us. Well, he says, I can’t afford to leave it without something. Well, I said, will three per cent do you? Yes. Then a customer came and spoke to me and drew my attention away, and Mr. Read walked out. This conversation occurred at the time I handed the certificate to him.’

"What was said then respecting the payment of interest

occurred at the moment of delivering the certificate. And the terms of commercial paper cannot be varied by oral agreements forming part of the same transaction. Without that evidence the plaintiff could not have recovered interest.

"The judgment should be reversed and a new trial granted, with costs to abide the event, unless the plaintiff within thirty days stipulates to modify the judgment by deducting the interest recovered, amounting to \$1,345.54, in which event the judgment, as so modified, is affirmed, with costs of this court to the appellant."

Spencer Clinton for appellant.

O. O. Cottle for respondent.

PARKER, J., reads for reversal unless plaintiff stipulates to modify as stated in opinion.

All concur.

Judgment accordingly.

HUBBARD J. GOODRICH, Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Argued March 11, 1891; decided April 14, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 6, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

Hamilton Harris for appellant.

Edwin Countryman for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

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THE LEATHER MANUFACTURERS' NATIONAL BANK, Appellant,
v. LAURA P. HALSTED et al., Respondents.

(Argued March 12, 1891; decided April 14, 1891.)

APPEAL, under section 1336 of the Code of Civil Procedure, from final judgment in favor of defendants, entered upon an order of Special Term, made August 1, 1887, after an affirmance by the General Term of the Supreme Court in the first judicial department, of an interlocutory judgment, entered upon an order of Special Term sustaining a demurrer to the complaint.

Charles E. Hughes for appellant.

Wm. Pierrepont Williams for respondents.

Agree to affirm on authority of *Knower v. Central National Bank* (*ante*, p. 552).

All concur.

Judgment affirmed.

JULIA KAYSER, Appellant, v. ANNA M. ARNOLD et al.,
Respondents.

(Argued March 16, 1891; decided April 14, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 24, 1888, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

This was an action to compel the specific performance of an alleged oral contract to execute a written instrument granting to plaintiff a license to use certain patents and inventions.

The following is an extract from the opinion :

"Not only was the writing in question incomplete, because it did not contain all that the parties had agreed should be inserted, but there were important blanks in the writing, with reference to which no agreement or understanding existed, and

it had never been determined how they should be filled. The blanks existed not only in the paper, but also in the minds of the parties, which had never met upon the subject. No general right purported to be granted to the plaintiff, but only a special, though exclusive, right of user, dependent wholly upon the weight of the fabric per yard, yet the blank for this vital particular was left unfilled. There was no agreement, verbal or written, express or implied, as to what that blank should contain. There was no evidence from which the court, even if it were otherwise practicable, could have filled the blank. Every right of the plaintiff rested upon this unadjusted matter, which was left blank in both places where it occurred in the proposed agreement. Careful provision was made for a forfeiture of his right if the plaintiff used the machines in violation of the license, limited to an undetermined weight per yard of the material manufactured into gloves. The learned counsel for the plaintiff contends that the instrument, if signed, would be so construed as to mean 'a reasonable weight per yard,' but the parties did not agree to this, and if they had there is no evidence to enable the court to determine what a reasonable weight would be. No standard of comparison is disclosed. Far from agreeing upon that point, the parties did not even discuss it.

"The proposed agreement was blank also as to its duration, to the extent at least of an entire year, a consideration of some importance when it is borne in mind that the amount of the royalties was guaranteed by the plaintiff to be less than \$6,000 a year.

"We agree with the learned General Term in saying 'it is impossible to deduce from this unsigned instrument the terms of a contract sufficiently clear and definite to enable a court to enforce the specific performance thereof.' We do not think that the parties should be compelled to sign a writing so incomplete and indefinite as to be incapable of enforcement when signed.

"The judgment should be affirmed, with costs to the defendants Jennings, but without costs to the defendants Arnold."

A. J. Dittenhoefer for appellant.

676 MEMORANDA OF CAUSES NOT REPORTED.

Frank E. Blackwell for respondent Arnold.

Sanford H. Steele for respondent Jennings.

VANN, J., reads for affirmance.

All concur.

Judgment affirmed.

ENOS B. WOOD, as Supervisor, etc., Respondent, *v.* THE BOARD OF SUPERVISORS OF MONROE COUNTY, Appellant, et al., Defendants.

(Submitted March 20, 1891; decided April 14, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 25, 1890, which modified, and affirmed as modified, a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

W. A. Sutherland for appellants.

Cassius C. Davy for respondent.

Agree to affirm on authority of *Crowninshield v. Bd. of Suprs. of Cayuga Co.* (*ante*, p. 583).

All concur.

Judgment affirmed.

I N D E X.

ACCORD AND SATISFACTION.

1. While the payment of a sum less than the amount of a liquidated debt, under an agreement of the creditor to accept the same in satisfaction of the debt, forms no bar to the recovery of the balance, if there be some additional benefit or legal possibility of benefit to the creditor, this will be a sufficient consideration to support an agreement to accept the lesser sum in full payment. *Jaffray v. Daris.* 164
2. Where, therefore, one indebted on an open book account gave to his creditor his promissory notes for one-half of his debt, secured by a chattel mortgage, under an agreement with the creditor that he would accept the same in full satisfaction and discharge of the debt, and the debtor paid the notes as they became due and the creditor satisfied the mortgage, *held*, that the new agreement was valid and supported by a sufficient consideration; and so, an action could not be maintained to recover the balance of the debt. *Id.*

ACCOUNTING.

1. In an action upon an agreement by a licensee to pay royalties for a right to make and sell a patented invention, where part of the relief demanded is a rescission of the agreement because of defendant's breach of the contract, and that relief is granted, plaintiff is entitled to an accounting and payment of royalties up to the time of the entry of judgment, but relief by injunction against future acts on the part of defendant will not be granted. *Hyatt v. Ingalls.* 93
2. A patent for an improvement in illuminating basements and basement extensions, sidewalks, roofs,

etc., was issued to plaintiff in 1867, and reissued in 1878. By an agreement made in November, 1878, plaintiff granted to defendants the exclusive right to manufacture and sell within certain territorial limits the illuminated tile work covered by the patent and its reissue. It was provided that the license should last during the continuance of the patent, or any extension or renewal thereof. The licensees recognized the validity of the patent, and expressly consented that it might be reissued by plaintiff as often as she should choose to do so. Defendants agreed to pay a specified royalty for tiles or plates used for the purposes specified in the patent. They manufactured and sold the patented articles, and up to August 1, 1881, paid royalties thereon. In September, 1881, plaintiff obtained a reissue of the patent, and thereafter defendants refused to pay royalties, although they continued to manufacture and sell. Plaintiff thereupon notified them that the license was forfeited. In an action to procure a cancellation of the agreement, an accounting and payment of royalties, the referee refused to find that defendants were liable to account for illuminating tiles when they had inserted glasses in iron which were adapted or could be used for illuminating roofs of areas or basement extensions, and had not shown they were not so used; he also refused to find that they were liable to account for all such tiles adapted to such use, manufactured and sold by them to others to be used, as the defendants had not shown were so used. *Held*, no error; that while it was defendants' duty to account for all sales of tiles which were used for the licensed purposes, they were not chargeable under the contract for tiles sold which were not so used, or because they did not know to what use

they were in fact applied; and that the burden was upon plaintiff to show that tiles sold by defendants were used for the purposes specified, to entitle her to royalties thereon. *Id.*

3. Upon the accounting of executors the surrogate refused to credit them with \$250 paid to a commandery of which the testator was a member, for parading at his funeral, and which did not appear to have been demanded by it as a condition of participation. *Held*, no error. *In re Reynolds*. 388

4. *It seems*, that where one member of a firm sells out his interest in the firm to the other members, who continue the business with the firm property, and the sale is subsequently set aside for fraud, the out-going partner may require his copartners to account to him as trustees for the profits resulting from the business after his retirement. *White v. Reed*. 468

5. Where, however, the retiring partner received on the sale more than the amount of his interest in the capital or assets of the firm, he is not entitled to share in the subsequent profits; the fraud that induced the sale entitles him to full indemnity for any loss suffered thereby, but does not entitle him to recover upon an accounting. *Id.*

6. In an action for such an accounting, the sale was adjudged to have been induced by fraud, defendants were required to account, and it was directed that upon such an accounting plaintiff be charged with the moneys paid and the value of the property transferred to him on the sale. The referee decided that plaintiff received more than the value of his interest in the firm assets, and judgment was entered against him for the excess. *Held*, error; that after the obstacle produced by the sale and release was removed, plaintiff's remedy required an accounting to ascertain whether he was entitled to any, and, if so, what amount, treating his former partners as trustees of the capital in which he had an interest, and it having been found he

had no such interest, he was not entitled to share in the subsequent profits; but that defendants had no cause of action or right of recovery against him. *Id.*

ADMISSIONS AND DECLARATIONS.

An admission by an administrator or executor is not binding as against the estate, unless made while he was engaged in his representative capacity in the performance of a duty to which the admission was pertinent so as to constitute it a part of the *res gesta*. *Davis v. Gallagher*. 487

ALIMONY.

Where an action by a wife for a judicial separation from her husband on the ground of abandonment is determined in her favor, the court has power as part of the final judgment, to make an allowance for the repayment of sums expended by plaintiff in her support and maintenance since the commencement of the action. *Percival v. Percival*. 637

APPEAL.

1. In every case triable by the court without a jury, or by a referee, if evidence is presented, there must be a decision of the court or a report of the referee stating separately the facts found and the conclusions of law based thereon, as required by the Code of Civil Procedure (§ 1022); in the absence thereof the judgment cannot be reviewed. *Wood v. Lary*. 83

2. *It seems*, however, this rule does not apply where the complaint was dismissed before the introduction of testimony, or where judgment was rendered on the pleadings. *Id.*

3. In an action brought, among other things, to charge certain real estate with moneys alleged to have been wrongfully invested therein by the defendant, the complaint was dismissed; on appeal the General Term reversed the judgment and granted a new trial, but directed the com-

- plaint and notice of pendency to be amended by striking out all allegations concerning said real estate. No motion for an amendment had been made and the record did not disclose the existence of any of the causes prescribed for the cancellation of the notice, or that counsel on either side were heard upon the question. *Held*, that the General Term had no power to direct the notice of pendency to be so amended as to cancel and destroy it. *Beman v. Todd*. 114
4. When an appeal is taken to this court from a provision inserted in an order of General Term granting a new trial, which the court had no authority to make, the stipulation, that in case of affirmance, judgment absolute shall be rendered against the appellant, required by the Code (Subd. 1, § 191) need not be given. *Id.*
 5. In an action for divorce, an order of reference was entered by consent of the court on stipulation of the parties. After one hearing before the referee, plaintiff moved to vacate the order, and to have the issue sent to a jury. This motion was denied. *Held*, that as plaintiff had waived her right of trial by jury the motion was not a demand of a right, but a petition for a favor; and so, it presented a matter in the discretion of the court, the exercise of which was not reviewable here. *Winans v. Winans*. 140
 6. The plaintiff afterwards moved for leave to discontinue the action without payment of costs or allowance, or on such terms as the court might decree. The alleged contract of marriage was denied by defendant; it was not claimed by plaintiff that any marriage ceremony was ever performed, and, according to her evidence, the contract rested in parol, and was made when no witnesses were present. It appeared that some years before the commencement of this action and on the eve of defendant's marriage to another, plaintiff sought and succeed in obtaining redress for an alleged injury not consistent with a claim of marriage; that defendant married and lived with another woman in the open relation of husband and wife for several years until her death; he thereafter married another woman, who was designated in the complaint as co-respondent, by whom he had, prior to the commencement of this action, one child. The motion was denied. *Held*, that the matter was within the discretion of the court, and so, not reviewable here. *Id.*
 7. Where a complaint sets forth two inconsistent causes of action, and the defendant waits until the trial and then moves that plaintiff be compelled to elect between them, the court may decline to decide the motion until part or all of the evidence is taken, and a denial of the motion is so far discretionary that it will not be reviewed when it appears that defendant was not harmed. *Tuthill v. Skidmore*. 148
 8. Where an action by a wife for a judicial separation from her husband on the ground of abandonment is determined in her favor, and the court as part of the final judgment, makes an allowance for the repayment of sums expended by plaintiff in her support and maintenance since the commencement of the action, the General Term has power to review the judgment in this respect, and to strike out the allowance as improvidently made. *Percival v. Percival*. 637
 9. *It seems*, a General Term order striking out the allowance on the ground that the court below had no power to grant it, is error. *Id.*
 10. It must appear, however, from the order that the action of the General Term in striking out the allowance was based on the ground of want of power in the court below to authorize this court to review it; the opinion may not be resorted to to determine the grounds of the decision. *Id.*
 11. Where incompetent evidence has been admitted on the trial of an action and it affirmatively appears from the opinion below that it was relied on in deciding a material issue, its admission cannot be regarded as a harmless error and will be sufficient ground for the reversal

of a judgment. *Newhall v. Apple-
ton*. 668

12. Defendants contracted to pay plaintiff for orders obtained for certain serial publications. In an action upon the contract, one H., who had been employed by plaintiff as an assistant under a contract expressed in the same terms, was permitted to testify, under objection, as to what he understood the language used entitled him to receive. A judgment in favor of plaintiff was rendered and the referee, in his opinion, referred to the evidence as corroborative of plaintiff's understanding of the contract. *Held*, that the evidence was incompetent, and its reception error, requiring a reversal. *Id.*

— *When error in judgment may be corrected on appeal without ordering a new trial.*

See Outwater v. Moore. 66

— *It seems where in an action for breach of contract the amount of damages is a question of law, the General Term, instead of granting a new trial, may modify verdict and direct judgment for the correct amount.*

See Andrews v. Breister. 438

— *When "damages by way of costs for the delay" (Code Civ. Pro. § 325, subd. 5) properly awarded by the Court of Appeals against an unsuccessful appellant.*

See Jackson v. City of Rochester. 624

— *When expressions of trial court in charge, calculated to excite prejudice in minds of jury against one of the parties, a sufficient ground for reversal.*

See Hogan v. C. P., N. & E. R. R. Co. (Mem.) 647

See UNDERTAKING.

ASSESSMENT AND TAXATION.

1. In an action brought by property owners in the city of Buffalo to determine the legality of certain assessments upon their premises to pay the expense of macadamizing a street, to enjoin the city from enforcing the collection thereof, and to restrain payment of any

money to the defendant McC., who was the contractor for the work, out of the fund created by the assessment, it appeared that the contract with McC. provided that payments should be made to him semi-monthly, as the work progressed, at the discretion of the common council, upon estimates of the engineer of the amount of work actually performed. The only finding as to any wrong doing by any city officer was that the city engineer, knowing that McC. had not performed the work in accordance with the specifications, had recommended the common council to pay McC. out of said fund. There was no finding that said recommendation had been adopted, or that the common council were about to adopt it, or had fraudulently or wrongfully directed payments to McC., or that the other city officials, without whose acts, under the city charter (§ 30, tit. 2, chap. 519, Laws of 1870), money could not be drawn from the treasury, were threatening to do any wrong or improper act, or that McC. held any orders or warrants that have not been paid. A judgment was rendered, declaring the assessments void, restraining their collection, and enjoined the city and its officers from drawing any order or warrant, or directing any to be drawn, on said fund to McC. or his order until the work was completed as required. The General Term reversed the judgment as to the assessments, but affirmed the residue thereof. *Held*, it must be assumed that the assessments and the contract with McC. were valid; that in the absence of a finding that the duty imposed upon the common council by the charter as to McC.'s contract was not properly and rightfully performed, the court could not interfere, and, therefore, that the affirmation was error. *Un. Cemetery Assn. v. McConnell.* 88

2. *It seems that when the alleged illegality upon which relief against an assessment is founded is patent upon the record on which the person claiming under it must rely to support his claim, the owner of the land is not entitled to affirma-*

tive relief to remove it, as in the legal sense it is not a cloud upon the title nor prejudicial to him. *Pooley v. City of Buffalo.* 206

8. So also, although the infirmity may not appear on the record, if the claimant cannot establish his claim without developing the defect which will defeat it, the owner of the land cannot have affirmative relief. *Id.*

4. The same principles apply to an action having in view the recovery of money paid by the owner upon an assessment unless it was made by those having no jurisdiction to make it, or unless the payment was made under coercion in fact. *Id.*

5. *It seems*, also, where the charter of a municipality provides that it shall be presumed that every assessment made is "valid and regular, and that all the steps and proceedings required by law were taken and had until the contrary shall be made to appear," this presumption entitles a person whose land is assessed to relief, when the illegality of the assessment is shown, and it rests in something *de hors* the record. *Id.*

6. In an action to recover money paid upon an assessment on property in Buffalo the court found that certain persons whose lands were assessed filed with the city clerk objections to the roll, and that he reported the filing of such objections to the common council, but did not lay the roll or objections before that body, nor did it at any time have or consider such objections as required by the city charter (§ 14, tit. 6, chap. 519, Laws of 1870). By the charter (§ 36, tit. 7) it is declared that it shall be presumed that every assessment made under it is valid and regular, and that all proceedings required by law were taken unless the contrary appears. *Held*, it could not be assumed that any of such objections were made by the plaintiff or any of his assignors, or that they or any of them went to the validity of the assessment; that as the burden was upon plaintiff to prove the facts entitling him to relief, it was necessary to show that he was or

may have been in some manner prejudiced by the failure of the common council to consider the objections made; and that in the absence of any evidence justifying a finding of some fact showing the illegality, the action was not maintainable. *Id.*

7. The legislative power is ample to provide for a municipal improvement, and for that purpose to designate the district deemed benefited by it within the municipality, charge the expenses of it upon the property in such district and direct assessments to be made therefor. *McLaughlin v. Miller.* 510

8. Where, however, the duty of distribution of such expense by assessment upon the several properties within the designated district is by the statute devolved upon any board or officer, some provision for notice to the property owners is essential; as without an opportunity to be heard they would be deprived of their property without due process of law. *Id.*

9. In an action for a breach of a covenant against incumbrances in a deed of certain premises in the city of B., executed by defendant to McL., plaintiff's testator, in 1872, it appeared that prior to the execution of the deed the street in front of said premises had been improved pursuant to several acts of the legislature (Chap. 335, Laws of 1860; chap. 299, Laws of 1861; chap. 748, Laws of 1865; chap. 885, Laws of 1867; chap. 759, Laws of 1869; chap. 608, Laws of 1870), which provided among other things that, after the completion of the improvement, \$150,000 of its cost should be "assessed equally upon the lands fronting upon said" street, and that such assessment, "unless previously paid," should, with interest thereon, be included in the annual taxes to be levied upon such lands, and one-twentieth part of such assessment be levied and collected annually for twenty successive years, beginning with the year after the completion of the improvement. No provision was made for notice to the lot owners; nor was a method prescribed of ascertaining the amounts

chargeable upon the different parcels of land. The improvement was completed in 1870. In the assessment-roll for that year the sum of \$550.12 was designated as the portion chargeable to the lots in question and the installment for that year was included with other taxes; this was paid by defendant, also the similar installment for 1871. It did not appear that any notice or opportunity to be heard was given to the property owners or that an assessment of the amount was in fact made by the city board of assessors. Plaintiffs claimed to recover the subsequent installments paid by McL. *Ild*, that the burden was upon plaintiffs to prove that the assessment had been made and had become a charge or incumbrance on the property at the time of the conveyance; that as the determination of the amount to be assessed upon each lot was left by the legislature to others, the owners had a right to be heard; and, therefore, that the amount chargeable upon the lots in question was not legally ascertained and determined at the time of the delivery of the deed, so as to make it a charge or incumbrance within the meaning of the covenant and, so, that the action was not maintainable. *Id*.

10. A town, by bonding itself in accordance with the statute, and causing a railroad to be built, creates a new and additional property, which becomes the subject of taxation; the remainder of the county is, for the time being, deprived of the benefit to be derived from the taxation thereof, so that the town may reap the benefits by having the taxes applied in satisfaction of its bonded indebtedness; and thus the sinking fund provided for by the statutes (Chap. 907, Laws of 1869, as amended) is, up to the time the bonds become due and payable, a fund the town has an absolute right to have applied in payment of its bonds. *Crownsfield v. Bd. of Suprs.* 583

11. In 1871, the town of I., pursuant to the provisions of the act of 1866 (Chap. 433, Laws of 1866), issued its bonds in aid of the construction of a railroad through the

town. The state and county taxes collected from the railroad company upon the assessed valuation of its property in the town from the years 1872 to 1887 were paid over to the county treasurer, who used them in the payment of state taxes and county indebtedness, and no money was set apart by him as a sinking fund to pay the bonds so issued. The town taxes so assessed and collected were paid over to the supervisor of the town and used by him in paying town expenses. Said bonds were paid by the town from moneys raised by general tax on property in the town, including that of the railroad company. Upon a case submitted under the Code of Civil Procedure (§ 1279), *held*, that the town was entitled to recover of the county the amount of the state and county taxes so paid to the county treasurer within six years prior to the submission; and that the failure of the town to pay over the amount of town taxes collected from the railroad company did not establish a waiver or constitute an estoppel. *Id*.

12. Also *held*, that the county was not entitled to have the stock of the railroad company, received by the town in exchange for its bonds, sold and the proceeds applied in payment of said bonds; that the town had the absolute right to have the sinking fund provided for by law applied in payment of the bonds without regard to the stock. *Id*.

13. Certain town assessors, not knowing of the repeal, by the act of 1872 (Chap. 355, Laws of 1872), of the provision of the Revised Statutes (1 R. S. 389, § 4, as amended by chap. 287, Laws of 1871) directing that a farm or lot lying in two towns or wards shall, if occupied, be assessed in the town or lot where the occupant resides, assessed a farm owned and occupied by plaintiff as so prescribed, and the commissioner of highways of the town, in making his assessment for highway labor, assessed plaintiff for highway labor on his whole farm in compliance with the provision of the statute (1 R. S. 506, § 24) requiring him to

make his apportionment upon real estate "as the same shall appear upon the last assessment-roll of the town." Plaintiff worked out the tax at the demand of the overseer of the highways, but protested against its legality. *Held*, that an action was not maintainable against the commissioner to recover the value of the labor so rendered by plaintiff; as that officer had jurisdiction to assess plaintiff and simply obeyed the command of a valid statute. *Hampton v. Hamsher* 684

ASSIGNMENT.

1. An undivided part of a demand may be sold and transferred, and if all the owners of the demand unite in a suit upon it the fact of the assignment constitutes no defense. *Whittemore v. Judd L. & S. Oil Co.* 565
2. Defendant, the J. L. & S. Oil Co., brought an action upon an alleged joint claim against T. & H. T. alone defended, denying any liability on his part. The action was determined in favor of the plaintiff therein; one roll was filed, but separate judgments were entered against the defendants for different amounts, the one against T. being the greater by the amount of the costs and interest. In an action to restrain the collection of the judgment against H., *held*, that the judgment against T. could be separately assigned without affecting the rights of the creditor as against H. *Id.*

ASSIGNMENT (FOR BENEFIT OF CREDITORS).

1. P., the surviving member of the firm of H. R. P. & Son, for the purpose of paying firm obligations, borrowed money from the C. N. Bank, for which he gave a note payable on demand, signed with the firm name by him as survivor; he applied this money in payment of firm debts. At the time said note was given the firm was insolvent, but P. and the bank were ignorant of that fact. P., as survivor, made an assignment for the benefit

of creditors in which said bank was preferred the amount of said note. In an action to set aside said assignment as fraudulent and void because of this preference, *held* (VANN, J., dissenting), that the claim of the bank was one which in justice and equity, should be paid out of the firm assets; and so, that its preference did not render the assignment fraudulent. *Durant v. Pierson.* 444

2. An assignment for the benefit of creditors in due form is valid as between the parties to it, and, upon acceptance of the trust by the assignee, he becomes bound to execute its directions. If fraudulent as against creditors, it is only voidable by adjudication at their election, or that of some one of them, and until an attack is made with a view to such a judicial determination, it will be treated as valid and must be executed accordingly. *Knower v. Cent. Nat. Bank.* 552
3. Title is vested in the assignee for the purpose merely of executing the trust in the manner directed; a creditor, paid pursuant to such directions, receives his debt through the execution of the trust, and his title is supported by the pre-existing debt upon which payment has been made, pursuant to the right of the debtor to make and the creditor to receive it. *Id.*
4. Payment, therefore, by an assignee for the benefit of creditors, to a preferred creditor of the assignor of the amount of the debt honestly due him, pursuant to the directions in the assignment, before any lien has been obtained upon the fund, is effectual to vest title in such creditor to the money so paid, although the assignment, in an action subsequently commenced, is adjudged fraudulent and void as against the creditors. *Id.*
5. The mere fact of knowledge on the part of the creditor so paid of the intent of the debtor to defraud his other creditors by the disposition of his property in payment of the debt, does not prejudice the right of the creditor to seek and obtain payment. *Id.*

6. Accordingly, *held*, that the rights of a bank, a preferred creditor, were not prejudiced by the fact that after the making of the assignment and with knowledge of the fraudulent intent on the part of the assignors, it obtained judgment by confession from them for the amount of the preferred debt, issued execution thereon, and by its directions the sheriff allowed the assignee to sell the assigned property, and returned the execution unsatisfied. *Id.*

7. In an action by a creditor, after obtaining a judgment setting aside such an assignment as fraudulent, against a preferred creditor, who had been paid the amount of his preferred claim, by the assignee before the bringing of said action to set aside the assignment, to recover back the money paid, *held*, that knowledge on the part of defendant at the time of the payment that a suit was then pending in behalf of creditors, other than the plaintiffs, to set aside the assignment, did not prejudice defendant; that such other action was in its effect and result only available to the plaintiffs therein. *Id.*

8. Where a warrant of attachment has been vacated and a levy thereunder released, a subsequent restoration of it does not operate to burden the property levied upon in the hands of a *bona fide* purchaser, or of an assignee for the benefit of creditors. *Pach v. Gilbert.* 612

— *As under laws of Connecticut, real estate not in that state is exempt from the operation of an assignment for the benefit of creditors, an assignee under such an assignment made in that state cannot, as representative of creditors, bring an action in this state under the act of 1858 (Chap. 314, Laws of 1858) to reach lands situate here fraudulently conveyed by his assignor* (FOLLETT, Ch. J., dissenting).

See N. T. Bank v. Wetmore. 241

ATTACHMENT.

1. Where a warrant of attachment has been vacated and a levy thereunder released, a subsequent res-

toration of it does not operate to burden the property levied upon in the hands of a *bona fide* purchaser or of an assignee for the benefit of creditors. *Pach v. Gilbert.* 612

2. In an action against a sheriff for failure to return an execution, it was conceded that O, the judgment debtor against whom the execution was issued, did not have, at the date it was issued, or at any time thereafter, any property out of which it could have been satisfied. It appeared, however, that a warrant of attachment had been issued in the action and delivered to defendant as sheriff, who, by virtue thereof, levied upon sufficient property of the debtor to satisfy plaintiff's claim. The judge who granted the warrant, on an *ex parte* application, made an order vacating it and the sheriff thereupon released the goods from the levy; they were thereafter levied upon by him, by virtue of executions issued upon other judgments against O. The latter, subsequent to such levy, made an assignment for the benefit of creditors. Said order was thereafter, upon application of plaintiff, set aside. The order setting it aside contained this provision: "the lien of said attachment is restored." On appeal to this court the order was modified by striking out this provision and, as so modified, affirmed. While the attachment, the order vacating it and the order setting aside the order of vacation were in his hands, the sheriff sold the property under said executions and the proceeds of sale, which were more than sufficient to satisfy plaintiff's execution, were wholly applied by the sheriff upon the other executions. *Held*, that while the order restoring the vitality of the attachment did not operate to affect or change the rights which the assignee had acquired in the property under said assignment, yet it gave to the attachment validity in the hands of the sheriff as of the date when it was issued, and it became his duty to apply sufficient of the proceeds of the sale so made by him upon the other executions in satisfaction of plaintiff's execution (Code Civ. Pro. §§ 697, 1406, 1407); that the

modification of the order restoring the attachment did not affect plaintiff's rights in this respect, and that, therefore, defendant failed to show in mitigation that plaintiff was not injured by his action. *Id.*

BANKS AND BANKING.

1. The rule that when deposits are received by a bank, unless they are special deposits, they belong to it as a part of its general funds, and the relation of debtor and creditor arises between it and the depositor applies where the deposit is of trust money, unless the act of depositing it is a misappropriation of the fund. *O'Connor v. Mechanics' Bank.* 324

2. One B. died leaving a will, by which he gave his residuary estate to his executors in trust, for the benefit of his four children, with power to sell all or any part thereof, and directed that the same be distributed "in such manner and form and at such time or times as shall in their judgment be for the best interests of my said children." The executors sold a portion of the personal property and deposited a portion of the proceeds in the defendant's bank to the credit of the estate of B. Said executors made an apportionment among all the legatees, and drew a check on defendant to the order of F., one of the legatees, for a balance due him and mailed it to him. F. indorsed the check in blank, and, after passing through several hands, it was paid by defendant March 10, 1888, in the usual course of business. It was not certified and had not been presented before. Prior to such payment a judgment had been recovered against F., and a third-party order in supplementary proceedings based thereon granted and served upon defendant's cashier; this order contained the usual injunction clause. Plaintiff was appointed receiver; after he had qualified, he demanded of defendant the amount on deposit in the account off the estate of B. belonging to F., "or due him from it;" this demand was refused. F. had no notice of the proceedings in which plaintiff was appointed receiver. In an action to recover

the portion of the deposit alleged to belong to F., *held*, that in order to recover plaintiff was bound to show that when the order was served on defendant, it had in its possession or under its control certain personal property then belonging to F., or that it then owed him a debt that the relation between B.'s executors and defendant was that of creditor and debtor only, and in a legal sense they had no money in the bank, but simply a debt against it to the amount of the deposit, that the apportionment and distribution being simply an agreement by the executors among themselves, and so, subject to revocation, and being unaccompanied by any assignment, oral or written, although followed by the giving of a check by them, did not effect a change of title to said debt or any part thereof, or operate as a transfer to the payee of any right as against the bank; and so, that plaintiff failed to establish a cause of action. *Id.*

3. Where a certificate of deposit issued by a bank contained no provision for the payment of interest, *held*, that in an action thereon against the bank testimony of an oral agreement made by the bank at the time of the deposit to pay interest was incompetent. *Read v. Bank of Attica.* 671

BILLS, NOTES AND CHECKS.

1. An ordinary uncertified check upon a general bank account is neither a legal nor an equitable assignment of any part of the sum standing to the credit of the depositor, and confers no right upon the payee which he can enforce against the bank. *O'Connor v. Mechanics' Bank.* 324
2. Such a check is simply an order which may be countermanded and payment forbidden by the drawer at any time before it is actually cashed. *Id.*

BONA FIDE HOLDER.

Where a warrant of attachment has been vacated and a levy thereunder released, a subsequent restoration

of it does not operate to burden the property levied upon in the hands of a *bona fide* purchaser, or of an assignee for the benefit of creditors. *Pach v. Gilbert*. 612

BOND

1. The provisions of the Code of Civil Procedure in reference to the bringing of actions upon the bond of an executor or administrator provide three separate and distinct remedies, each independent of the other. First. Where an execution issued upon a surrogate's decree against the property of the executor or administrator has been returned wholly or partly unsatisfied (§ 2607). Second. Where letters have been revoked and a successor has been appointed (§ 2608). Third. Where letters have been revoked and no successor appointed (§ 2609). *Hood v. Hayward* 1
2. The return of an execution unsatisfied is not essential to the maintenance of an action upon the bond of an executor whose letters have been revoked. (POTTER, J., dissenting.) *Id.*
3. Where the letters of one of two co-executors are revoked and no successor is required to carry out the express provisions of the will, and none is appointed, as the statute contemplates in such case that the survivor will perform all the duties of the trust (§ 2692), he is the successor of the removed executor within the meaning of the statute, and, as such, can bring an action upon the bond of the latter without the return of an execution unsatisfied. (POTTER, J., dissenting.) *Id.*
4. The letters were revoked because of misappropriation of the funds of the estate by the removed executor. By the surrogate's decree upon the final settlement of his accounts he was directed to pay a sum exceeding the penalty of his bond. The surety was charged with interest upon one half the penalty from the time of the misappropriation. *Held*, error; but that he was chargeable with interest from the date of the decree. *Id.*

5. The wife of plaintiff, having brought an action against him for limited divorce, for the purpose of settling the action he paid to defendants \$400 and received their bond, conditioned that they would support and maintain the wife during life and would forever save him harmless and exempt from any further liability therefor. At the time of the execution of the bond the wife had left her husband and was living with defendant D. her father. She subsequently returned to her husband, became a member of his family, obtained clothing upon his credit, for which he was required to and did pay, and he supported her. *Held*, that an action to enforce the bond was not maintainable; that it having been executed in view of the separation, the obligation was dependent upon its continuance; that when the wife returned to her husband, resuming permanently her place as his wife, the cause which led to the contract ceased and the considerations upon which it rested disappeared, and this although the wife returned to her husband's home without his consent, that she had the right so to do and he was bound to receive her. *Zimmer v. Settle*. 37

6. Where a penal bond recites that it was executed under seal, the obligor is estopped, in an action on the bond, from denying that it was so executed, when it appears that he knew the difference, in legal effect, between sealed and unsealed instruments, that he read, subscribed and placed the instrument in the custody of the person interested in having it accepted, who attached the seal and delivered it to the obligee, and that the latter received and acted upon it in good faith, supposing it to have been executed under seal. *Met. L. Ins. Co. v. Bender*. 47

7. C., by his will, gave all his property to T., who was appointed executor, in trust to convert the same into money, invest the proceeds, pay the interest to the widow of the testator during life, and, upon her death, to divide the principal among his children. In a proceeding instituted by the

widow, the plaintiff herein, for a final settlement of T's accounts as executor, the surrogate's decree charged him with a balance then in his hands, this balance it was decreed that "the said executor retain, invest and keep invested * * * according to the trust contained in the will." The decree did not in terms discharge the executor. Plaintiff thereafter applied for a further accounting, upon which it was adjudged that T. should pay into court the principal of the estate, and to plaintiff a balance of income due her. T. failed to pay as directed, and thereupon his letters were revoked. The complaint in this action, which was upon the bond given by T. as executor, alleged and it appeared that T. did not set apart any securities and made no investment of the trust fund. The defense was that the effect of the original decree was to terminate T.'s duties as executor, and that thereafter he acted only as trustee, and for such action his sureties were not liable. *Held*, untenable; that the retention by T. of the trust fund was not necessarily the act of a trustee as distinguished from that of an executor; that he did nothing to indicate that he treated the fund as held by him in any capacity other than that in which he had received it; that the duty in respect to investment having been imposed by the will, said decree might be treated as if it contained no direction in that respect, and the only practical effect of it was a settlement of T.'s account as executor, that it was entirely consistent therewith that the fund should be retained by T. in that capacity until invested; and that, therefore, the sureties were liable for his failure to obey the subsequent decree. *Chaff v. Day*. 195

See MORTGAGE.
TOWNS.

BOUNDARIES.

Where fixed monuments are referred to in the description in a deed, which sufficiently locate and determine the premises conveyed, they will control courses and distances. *Muhler v. Ruppert*. 627

BROKER.

See STOCK BROKER.

BROOKLYN (CITY OF).

Neither the General Railroad Act (Chap. 140, Laws of 1850), nor the acts amendatory and supplementary thereto, confer upon a company incorporated under it the right to build an elevated railroad in the streets of a city. A corporation, therefore, organized under said act for the purpose of constructing such a road in the streets of the city of Brooklyn, has no power so to do without first complying with the conditions of the charter of said city (§ 23, tit. 19, chap. 863, Laws of 1873), prescribed as prerequisites to the right to construct a railroad in its streets. *Schaper v. B. & L. I. Cable R. Co.* 630

— *As to assessments for the improvement of Fourth avenue in the city of Brooklyn.*

See *McLaughlin v. Miller*. 510

BUFFALO (CITY OF).

1. In an action brought by property owners in the city of Buffalo to determine the legality of certain assessments upon their premises to pay the expense of macadamizing a street, to enjoin the city from enforcing the collection thereof, and to restrain payment of any money to the defendant McC., who was the contractor for the work, out of the fund created by the assessment, it appeared that the contract with McC. provided that payments should be made to him semi-monthly, as the work progressed, at the discretion of the common council, upon estimates of the engineer of the amount of work actually performed. The only finding as to any wrong doing by any city officer was that the city engineer, knowing that McC. had not performed the work in accordance with the specifications, had recommended the common council to pay McC. out of said fund. There was no finding that said recom-

mentation had been adopted, or that the common council were about to adopt it, or had fraudulently or wrongfully directed payments to McC., or that the other city officials, without whose acts, under the city charter (§ 30, tit. 2, chap. 519, Laws of 1870), money could not be drawn from the treasury, were threatening to do any wrong or improper act, or that McC. held any orders or warrants that have not been paid. A judgment was rendered, declaring the assessments void, restraining their collection, and enjoined the city and its officers from drawing any order or warrant, or directing any to be drawn, on said fund to McC. or his order until the work was completed as required. The General Term reversed the judgment as to the assessments, but affirmed the residue thereof. *Held*, it must be assumed that the assessments and the contract with McC. were valid; that in the absence of a finding that the duty imposed upon the common council by the charter as to McC.'s contract was not properly and rightfully performed, the court could not interfere, and, therefore, that the affirmance was error. *Un. Cemetery Assn. v. McConnell*. 88

2. In an action to recover money paid upon an assessment on property in Buffalo, the court found that certain persons whose lands were assessed filed with the city clerk objections to the roll, and that he reported the filing of such objections to the common council, but did not lay the roll or objections before that body, nor did it at any time have or consider such objections as required by the city charter (§ 14, tit. 6, chap. 519, Laws of 1870). By the charter (§ 86, tit. 7) it is declared that it shall be presumed that every assessment made under it is valid and regular, and that all proceedings required by law were taken unless the contrary appears. *Held*, it could not be assumed that any of such objections were made by the plaintiff or any of his assignors, or that they or any of them went to the validity of the assessment; that as the burden was upon plaintiff to prove the facts entitling him

to relief, it was necessary to show that he was or may have been in some manner prejudiced by the failure of the common council to consider the objections made; and that in the absence of any evidence justifying a finding of some fact showing the illegality, the action was not maintainable. *Poolcy v. City of Buffalo*. 206

BURDEN OF PROOF.

1. The complaint herein alleged in substance that defendant wrongfully removed plaintiff's yacht from a certain place in the East river, where she had been laid up for the winter, to another place where she was exposed to danger, and that in consequence she sunk and was greatly damaged. Defendant's answer admitted plaintiff's title, the taking and sinking of the yacht, but denied that the taking was wrongful, and alleged it was his duty as custodian of the yacht to remove her to a safe place, and that he removed her where he had no reason to apprehend danger. The court charged that "the burden of proof is upon plaintiff, and he must establish by a preponderance of evidence that the vessel was removed without authority and without color of authority." *Held*, error; that, under the pleadings, the burden was upon defendant of showing some right to remove the yacht by way of justification. *Blunt v. Barrett*. 117
2. As a rule the burden of proof remains where the issue made by the pleadings places it, although the weight of the evidence on one side may have a controlling effect unless met by proof of the other party. *Id*.
3. In an action to recover damages for alleged negligence causing death, freedom of contributory negligence must be proved, and where the circumstances point as much to the negligence of the deceased as to its absence, or point in neither direction, a refusal to nonsuit is error. *Wisniewski v. L. S. & M. S. R. Co*. 420

4. The law will not assume that a servant has been derelict in duty simply from the fact that his employer has discharged him before the expiration of the term of employment, and in an action by him for a breach of the contract of employment, upon proof that he was discharged while engaged in the performance of the contract, and before his term of service had expired, the burden is cast upon the employer of proving, and hence of alleging, facts in justification of the dismissal. (Code Civ. Pro. § 500.) *Linton v. U. Fire-works Co.* 533
 5. In an action to recover possession of goods sold and delivered to defendants on the ground that the sale was induced by false and fraudulent representations made by them, the burden is upon the plaintiff to establish that such representations were made with intent to deceive and defraud. *Coffin v. Hollister.* 644
- CASES REVERSED, DISTINGUISHED, ETC.
- Handy v. Draper* (89 N. Y. 335), distinguished. *Hardman v. Sage.* 83
- Rocky Mountain Nat. Bank v. Bliss* (89 N. Y. 338), distinguished. *Hardman v. Sage.* 83
- Met. Life Ins. Co. v. McCoy* (41 Hun, 142), reversed. *Met. Life Ins. Co. v. Bender.* 47
- Gilkin v. Thumbird* (44 Md. 337), distinguished. *Met. Life Ins. Co. v. Bender.* 51
- Taler v. Glaser* (2 S. & R. 502), distinguished. *Met. Life Ins. Co. v. Bender.* 51
- Town of Barnet v. Abbott* (53 Vt. 120), distinguished and disapproved. *Met. Life Ins. Co. v. Bender.* 51
- Seybolt v. N. Y., L. E. & W. R. R. Co.* (95 N. Y. 562), distinguished. *Brewer v. N. Y., L. E. & W. R. R. Co.* 65
- Blunt v. Barrett* (22 J. & S. 548), reversed. *Blunt v. Barrett.* 117
- Phoenix Ins. Co. v. Conth. Ins. Co.* (87 N. Y. 400), distinguished. *Clark v. Devoe.* 125
- L. C. & D. R. Co. v. Bull* (47 L. T. 413), distinguished. *Clark v. Devoe.* 126
- Norman v. Wells* (17 Wend. 136), distinguished. *Clark v. Devoe.* 126
- Hudson v. Swan* (83 N. Y. 552), distinguished. *Tuthill v. Skidmore.* 155
- Jaffray v. Davis* (48 Hun, 500), reversed. *Jaffray v. Davis.* 164
- Keeler v. Salisbury* (33 N. Y. 653), distinguished. *Jaffray v. Davis.* 174
- Platts v. Walrath* (Lal. Supp. 59), limited and distinguished. *Jaffray v. Davis.* 174
- Goodwin v. Bunzl* (102 N. Y. 224), distinguished. *C. S. & A. Assn. v. Read.* 194
- Cluff v. Day* (23 J. & S. 460), reversed. *Cluff v. Day.* 195
- Phelps v. Mayor, etc.* (112 N. Y. 216), distinguished. *Pooley v. City of Buffalo.* 208
- Mygatt v. Coe* (44 Hun, 81), reversed. *Mygatt v. Coe.* 212
- Dickinson v. Hoome* (8 Grat. 353, 402), disapproved. *Mygatt v. Coe.* 227
- Lydick v. B. & O. R. R. Co.* (17 W. Va. 427), disapproved. *Mygatt v. Coe.* 228
- Packenham's Case* (Y. B. 42 Edw. III, 3), distinguished. *Mygatt v. Coe.* 229
- Breese v. U. S. Tel. Co.* (45 Barb. 274; 48 N. Y. 132), limited. *Pearsall v. W. U. Tel. Co.* 267
- MacAndrew v. E. Tel. Co.* (17 C. B. 3), questioned. *Pearsall v. W. U. Tel. Co.* 269
- Clement v. W. U. Tel. Co.* (137 Mass. 463), distinguished. *Pearsall v. W. U. Tel. Co.* 269

- Horey v. Village of Haverstraw* (47 Hun, 356), reversed. *Horey v. Village of Haverstraw*. 273
- Chipman v. Palmer* (77 N. Y. 51), distinguished. *Simmons v. Everson*. 323
- O'Connor v. Mechanics' Bank* (54 Hun, 272), reversed. *O'Connor v. Mechanics' Bank*. 324
- Risley v. Phenix Bank* (83 N. Y. 818), distinguished. *O'Connor v. Mechanics' Bank*. 331
- Van Alen v. Am. Nat. Bank* (52 N. Y. 1), distinguished. *O'Connor v. Mechanics' Bank*. 332
- Baker v. N. Y. Nat. Ex. Bank* (100 N. Y. 81), distinguished. *O'Connor v. Mechanics' Bank*. 332
- Viets v. Un. Nat. Bank* (101 N. Y. 568), distinguished. *O'Connor v. Mechanics' Bank*. 332
- Pickersgill v. Myers* (99 Penn. St. 602), distinguished. *Decker v. Garäner*. 340
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- Whelan v. Lynch* (65 Barb. 326; 60 N. Y. 469), distinguished. *Allen v. McConike*. 348
- In re McComb* (117 N. Y. 378), distinguished. *In re Powers*. 369
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- Winirowski v. L. S. & M. S. R. Co.* (58 Hun, 40), reversed. *Winirowski v. L. S. & M. S. R. Co.*. 420
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- Remington v. Walker* (99 N. Y. 626), distinguished. *Cocks v. Haviland*. 433
- In re Conway* (58 Hun, 16), reversed. *In re Conway*. 455
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- Brown v. Clark* (77 N. Y. 369), distinguished. *In re Conway*. 463
- In re Washington Park* (52 N. Y. 131), distinguished. *In re Conway*. 463
- Tonnele v. Hall* (44 N. Y. 140), distinguished. *In re Conway*. 464
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distinguished. *Hamer v. Sidway*.
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tinguished. *Hamer v. Sidway*.
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Beaumont v. Reeve (Shirley's L. C. 6),
distinguished. *Hamer v. Sidway*.
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distinguished. *Hamer v. Sidway*.
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tinguished. *Hamer v. Sidway*.
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192), distinguished. *Hamer v. Sid-
way*. 548

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distinguished. *Hamer v. Sidway*.
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Robinson v. Jewett (116 N. Y. 40),
distinguished. *Hamer v. Sidway*.
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Hone v. Henriquez (18 Wend. 240)
distinguished. *Knower v. C. N.
Bank*. 562

Mackie v. Cairns (5 Cow. 547) distin-
guished. *Knower v. C. N. Bank*.
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Wait v. Wait (4 N. Y. 95) distin-
guished. *Price v. Price*. 599

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280; 37 id. 228), distinguished.
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Bromer v. Bowers (1 Abb. Ct. App.
Dec. 214), distinguished. *Price v.
Price*. 600

Griffin v. Banks (37 N. Y. 621), dis-
tinguished. *Price v. Price*. 600

St. Peter v. Denison (58 N. Y. 416),
distinguished. *Atwater v. Trustees,
etc.* 610

Pumpelly v. Green Bay Co. (13 Wall.
166), distinguished. *Atwater v.
Trustees, etc.* 610

Smyth v. McCool (22 Hun, 595), dis-
tinguished. *Muhlker v. Ruppert*.
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*Beadleston v. Beadleston** (108 N. Y.
402), distinguished. *Percival v.
Percival*. 638

Galrin v. Mayor, etc. (112 N. Y. 223),
distinguished. *Riordan v. Ocean
S. S. Co.* 657

CAUSE OF ACTION.

Certain town assessors, not knowing
of the repeal, by the act of 1872
(Chap. 855, Laws of 1872), of the
provision of the Revised Statutes
(1 R. S. 889, § 4, as amended by
chap. 287, Laws of 1871) directing
that a farm or lot lying in two
towns or wards shall, if occupied,
be assessed in the town or lot where
the occupant resides, assessed a
farm owned and occupied by plain-
tiff as so prescribed, and the com-
missioner of highways of the town,
in making his assessment for high-
way labor, assessed plaintiff for
highway labor on his whole farm
in compliance with the provision
of the statute (1 R. S. 506, § 24)
requiring him to make his appor-
tionment upon real estate "as the
same shall appear upon the last as-
sessment-roll of the town." Plain-
tiff worked out the tax at the
demand of the overseer of the high-
ways, but protested against its
legality. *Held*, that an action was
not maintainable against the com-
missioner to recover the value of
the labor so rendered by plaintiff;
as that officer had jurisdiction to
assess plaintiff and simply obeyed
the command of a valid statute.
Hampton v. Hamsher. 634

— *When action not maintainable
to recover back money paid in satisfac-
tion of an illegal assessment for a local
improvement.*

See Pooley v. City of Buffalo. 206

See BOND.

COMMISSIONERS OF HIGHWAYS.
CREDITOR'S SUIT.
NEGLIGENCE.
PARTNERSHIP.
TELEGRAPH COMPANIES.

CHATTEL MORTGAGE.

1. A chattel mortgage not accom-
panied by immediate delivery or
followed by an actual or contin-

ued change of possession of the chattels mortgaged, and which was executed upon an agreement that the mortgagor may remain in possession and sell the property and use the avails in substantially the same manner as before the execution of the mortgage, is void as against the creditors of the mortgagor. *Manderille v. Avery*. 376

2. The term "creditors" includes all persons who were such while the chattels remained in the possession of the mortgagor under the agreement, and their rights are not affected by the fact that they did not obtain judgment or a specific lien until after delivery of the property to the mortgagee. *Id.*

3. The right of the creditor to collect his debt out of the mortgaged chattels may not be defeated by the mortgagee, simply by selling the property. *Id.*

4. An assent by a creditor to such an arrangement between the mortgagor and mortgagee, which would preclude him from asserting his rights as a creditor against the mortgaged property, must be such as to create against him an equitable estoppel, or it must exist in agreement supported by a valid consideration. *Id.*

5. Where an alleged assent was made upon condition that the mortgagor should return to the creditor a portion of the goods purchased of him, the purchase-price for which constituted the indebtedness, and would make payments to the mortgagee, neither of which conditions were complied with, *held*, that there was no consideration for the assent; and so, it was not binding. *Id.*

6. A creditor may not be deprived of his legal right to attack a chattel mortgage as fraudulent by an agreement made with his agent, waiving or surrendering such right, without evidence that he knew of the defect in the mortgage, and had authorized the agent to make the agreement, or had acquiesced in it when made. *Id.*

7. Although the mortgagee may possess an honest claim, he cannot

retain, as against a pursuing creditor, property obtained by him under his mortgage if it is fraudulent; and although he took and sold the property by virtue of the mortgage before any lien was obtained thereon by the creditor he may be compelled by the latter to refund the proceeds; the mortgage being void, all proceedings under it are void. *Id.*

8. In an action brought by a receiver appointed in supplementary proceedings to have two chattel mortgages covering the same property executed by the debtor set aside as fraudulent, and to compel the defendant A., the mortgagee in one of the mortgages and the assignor of the other, to account for and pay over the proceeds of sale of the mortgaged property, A. pleaded the pendency of a former suit in bar. That was an action brought by A. to recover possession of the property which had been levied upon under an attachment issued in favor of the judgment creditor against the debtor. Defendant in that action justified under the attachment, and alleged "that any transfer of said goods to the plaintiff was in fraud of creditors and void." The judgment therein decided that A. was the owner and entitled to the possession of the property. This judgment was reversed on appeal, and the action was still pending. One of the mortgages was shown to be fraudulent and void. *Held*, that the pending of the former action was not a bar to a recovery of the proceeds of the property sold to satisfy the void mortgage; that to establish his right to recover in that action, A. was only required to prove one valid mortgage and so, that the invalidity of the other was not necessarily involved. *Id.*

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

See REPLEVIN.

CLOUD ON TITLE.

1. *It seems* that when the alleged illegality upon which relief against an assessment is founded is patent

upon the record on which the person claiming under it must rely to support his claim, the owner of the land is not entitled to affirmative relief to remove it, as in the legal sense it is not a cloud upon the title or prejudicial to him.
Pooley v. City of Buffalo. 206

2. So also, although the infirmity may not appear on the record, if the claimant cannot establish his claim without developing the defect which will defeat it, the owner of the land cannot have affirmative relief. *Id.*

3. *It seems*, however, where the charter of a municipality provides that it shall be presumed that every assessment made is "valid and regular, and that all the steps and proceedings required by law were taken and had until the contrary shall be made to appear," this presumption entitles a person whose land is assessed to relief, when the illegality of the assessment is shown, and it rests in something *de hors* the record. *Id.*

CODE OF CIVIL PROCEDURE.

Subd. 1, § 191.	<i>Beman v. Todd.</i>	114
§ 488.	<i>N. Tr. Bank v. Wetmore.</i>	241
§ 499.	<i>Spofford v. Rowan.</i>	108
	<i>N. Tr. Bank v. Wetmore.</i>	241
§ 500.	<i>Linton v. Unexcelled Fireworks Co.</i>	533
§ 697.	<i>Pach v. Gilbert.</i>	613
§ 829.	<i>Davis v. Gallagher.</i>	487
	<i>Hayne v. Doerfler.</i>	505
§ 841.	<i>People ex rel. v. Ryder.</i>	500
§ 1022.	<i>Wood v. Lary.</i>	83
	<i>Lee v. Tower.</i>	370
§ 1279.	<i>Crowninshield v. Bd. of Supervisors.</i>	583
§ 1827.	<i>C. S. & A. Assn. v. Read.</i>	89
§ 1381.		
§ 1406.	<i>Pach v. Gilbert.</i>	613
§ 1407.		
§ 1582.	<i>People ex rel. v. Ryder.</i>	500
§ 1670.	<i>Beman v. Todd.</i>	114
§ 1674.	<i>Valentine v. Austin.</i>	400
§ 1720.	<i>Tuthill v. Skidmore.</i>	148
§ 1852.	<i>Hauselt v. Patterson.</i>	349
§ 1871.	<i>N. Tr. Bank v. Wetmore.</i>	241
§ 2607.		
§ 2608.	<i>Hood v. Hayward.</i>	1
§ 2609.		
§ 2692.		

COMMISSIONERS OF HIGHWAYS.

Certain town assessors, not knowing of the repeal, by the act of 1872 (Chap. 355, Laws of 1872), of the provision of the Revised Statutes (1 R. S. 38: § 4, as amended by chap. 287, Laws of 1871) directing that a farm or lot lying in two towns or wards shall, if occupied, be assessed in the town or lot where the occupant resides, assessed a farm owned and occupied by plaintiff as so prescribed, and the commissioner of highways of the town, in making his assessment for highway labor, assessed plaintiff for highway labor on his whole farm in compliance with the provision of the statute (1 R. S. 506, § 24) requiring him to make his apportionment upon real estate "as the same shall appear upon the last assessment-roll of the town." Plaintiff worked out the tax at the demand of the overseer of the highways, but protested against its legality. *Held*, that an action was not maintainable against the commissioner to recover the value of the labor so rendered by plaintiff; as that officer had jurisdiction to assess plaintiff and simply obeyed the command of a valid statute. *Hampton v. Hamsher* 634

COMMON CARRIER.

See RAILROAD CORPORATIONS.

CONFLICT OF LAWS.

— *As under laws of Connecticut, real estate not in that state is exempt from the operation of an assignment for the benefit of creditors, an assignee under such an assignment made in that state cannot as representative of creditors bring an action in this state under the act of 1858 (Chap. 314, Laws of 1858), to reach lands situate here fraudulently conveyed by his assignor. (FOLLETT, Ch. J., dissenting.) See N. Tr. Bank v. Wetmore. 244*

CONSIDERATION.

While the payment of a sum less than the amount of a liquidated

debt, under an agreement of the creditor to accept the same in satisfaction of the debt, forms no bar to the recovery of the balance, if there be some additional benefit or legal possibility of benefit to the creditor, this will be a sufficient consideration to support an agreement to accept the lesser sum in full payment. *Jaffray v. Davis*.

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CONSTITUTION.

Where defendant, while engaged in building a bridge, in pursuance of statutory authority, erected a coffer-dam in the outlet of a lake, which was necessary for the work, which obstructed the flow of the water from the lake and caused it to remain on plaintiff's land, and substantially deprived him of its beneficial use for one season, held, it appearing that the work was properly and expeditiously done, that defendant was not liable for the damages; that there was not a taking of plaintiff's property within the meaning of the constitutional provision prohibiting such taking without compensation. *Atwater v. Trustees, etc.*

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CONSTITUTIONAL LAW.

1. While the legislature has power to change rules of evidence and to provide other and new remedies, laws of this character, intended to have a retroactive operation, must be strictly construed, especially in so far as they provide for the vesting of property. *People ex rel. v. Ryder*.
2. The provision of said Code (§ 1582, as amended by chap. 39, Laws of 1889), authorizing the Special Term in an action for partition, in which a portion of the proceeds of a sale has been paid into court or deposited with the county treasurer for unknown heirs and twenty-five years have elapsed without any claim being made thereto, by any person entitled thereto, "to decree that such unclaimed portion of such proceeds was vested at the time of such payment in the known heirs of the

common ancestor of such unknown heirs and their heirs and assigns," is unconstitutional, as it authorizes the court to divest unknown heirs who may exist and who are not presumed to be dead, and to vest other and different persons with said fund, and thus deprives persons of their property without due process of law. *Id.*

CONSTRUCTION.

1. The primary rule for the interpretation of a covenant, as well as other contracts, is to gather the intention of the parties from the words, by reading not simply a single clause, but the entire context, and, where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered. *Clark v. Devoe*.
2. It seems that general words, following an enumeration of articles in the residuary clause of a will, are to be given the broadest and most comprehensive meaning of which they are susceptible, in order to prevent intestacy as to any portion of the testator's estate. *In re Reynolds*.
3. Except, however, in a residuary clause or where the will contains no such clause, when certain things are named in a devise or bequest, followed by a phrase, which need not, but may be, construed to include other articles, it will be confined to articles of the same general character as those enumerated. *Id.*
4. While the legislature has power to change rules of evidence and to provide other and new remedies, laws of this character, intended to have a retroactive operation, must be strictly construed, especially in so far as they provide for the vesting of property. *People ex rel. v. Ryder*.

CONTRACT.

1. In an action brought to recover damages for the death of B., plaintiff's intestate, who was killed while traveling in an express car in one of defendant's trains, by an

accident, caused by defendant's negligence, it appeared that B., at the time of his death, was in the employ of the U. S. Express Company, as messenger; that said company had entered into a contract with a railway company, to the rights and duties of which the defendant had succeeded, by which said railway company agreed to transport the messengers of the express company and certain specified property free of charge; the latter assuming all transportation risks and other liabilities arising in respect thereof, and agreeing to indemnify and protect the former therefrom. The responsibility of the railway company in transporting express freight was limited to cases of negligence, it, "in no event, whether of negligence or otherwise," to be responsible for property "carried by the railway company free of charge." There was no evidence that B. had any knowledge or information of the provisions of the contract. *Held*, that defendant was liable; that B. was a passenger and could not, without his knowledge or consent, be chargeable with the stipulations in the contract. *Breicer v. N. Y., L. E. & W. R. R. Co.* 59

2. *It seems* that, as the contract between the companies did not purport to relieve the defendant from its duty to exercise due care for the protection of the messenger, whatever right it could claim to relief from the consequences of its negligence in that respect arose by way of indemnity upon the stipulation of the express company. *Id.*

3. Plaintiff entered into a contract with the defendants for the sale to them of certain shares of stock of a railroad company owned by him, by the terms of which defendants agreed to pay him, on delivery of the shares, a price specified per share, and in case any other person had been or should be paid by or on account of the defendants, or either of them, any higher price per share for any of the stock of said railroad company, that defendants would pay to plaintiff on demand, in addition to the amount so to be paid to him on delivery,

the difference between that amount and the highest price paid to others. In an action upon the contract plaintiff gave evidence to the effect that a corporation was organized for the purpose of constructing the railroad in which defendants were the principal stockholders; that certain owners of stock of said railroad company brought actions against said corporation and the defendants and others, to recover moneys belonging to the railroad company alleged to have been misappropriated by the officers of said corporation, and for other relief; that said actions were settled by the construction company; that it paid to one B., who brought one of said actions and who was owner of 200 shares of the railroad stock, the sum of \$85,000 in settlement of his suit, it taking a transfer of his stock. It did not appear that in the settlement made anything was said in reference to the amount to be allowed or paid for the stock. *Held*, that this was not a sale within the meaning of the contract; that it contemplated the voluntary purchase of stock by the defendants, and not the amount paid in the compromise of an action; and so, that the evidence furnished no basis upon which a verdict for the plaintiff could have been entered. *Stewart v. Huntington.* 127

4. Although a court of equity will not, as a general rule, lend its aid to either of the parties to an illegal contract, by enforcing its execution or rescinding it, when the parties are not equally guilty, and when the public interest is advanced by allowing the more excusable of the two to sue for relief, the courts will take cognizance of an action for that purpose, and will grant relief by setting aside the contract and restoring the injured party to his original position. *Dural v. Wellman.* 156
5. To establish a defense in such an action, it is not sufficient for defendant to show merely that the plaintiff is *particeps criminis*, but it must appear that they were *in pari delicto*, unless the contract be *malum in se*. *Id.*

6. In an action to recover back money paid by plaintiff to defendant, who carried on a business known as "a matrimonial bureau," on an agreement by him to procure a husband for her, he to return the money paid on a day named, if at that time she was willing to give up all acquaintance with gentlemen introduced to her by defendant, there was no evidence of actual over-persuasion or undue influence. The court held, as a legal conclusion, that the contract was illegal, and that the parties to it were equal in guilt, and directed a verdict for defendant. *Held*, error; that while the contract was illegal, at most the inferences to be drawn from the facts as to the equity of guilt were for the jury. *Id.*
7. *It seems* that the business of promoting marriages is against the policy of the law and public interest, and the courts will aid a party who has patronized such a business by relieving him or her from all contracts made, and will grant restitution of any money paid or property transferred. *Id.*
8. *It seems* also that contracts by one party to procure, for a consideration, a husband or wife for the other, are considered as fraudulent in their character, and the party paying the consideration will be regarded as under a species of imposition or undue influence. *Id.*
9. While the payment of a sum less than the amount of a liquidated debt, under an agreement of the creditor to accept the same in satisfaction of the debt, forms no bar to the recovery of the balance, if there be some additional benefit or legal possibility of benefit to the creditor, this will be a sufficient consideration to support an agreement to accept the lesser sum in full payment. *Jaffray v. Darin*, 164
10. Where, therefore, one indebted on an open book account gave to his creditor his promissory notes for one-half of his debt, secured by a chattel mortgage, under an agreement with the creditor that he would accept the same in full satisfaction and discharge of the debt, and the debtor paid the notes as they became due and the creditor satisfied the mortgage, *held*, that the new agreement was valid and supported by a sufficient consideration; and so, an action could not be maintained to recover the balance of the debt. *Id.*
11. Plaintiff, who had been for a number of years a traveling salesman over a certain route, and who had been in defendant's employ under an oral agreement to sell its goods on commission, he to have the exclusive right to sell over that route without interference by the company or its salesmen, entered into a written agreement with it by which he agreed to travel over said route, which was termed in the contract "his route," at least six times a year, representing and selling defendant's goods and selling no other goods to conflict with them; defendant agreed to pay him for his services a commission on all orders accepted from *bona fide* purchasers, the commission on new trade to be double that allowed on the regular trade. Plaintiff entered upon his duties under the agreement and continued to discharge them until the agreement was terminated. In an action to recover commissions unpaid, it appeared that some of the orders accepted by the defendant came directly to it from the persons making them and some were taken by other employes of the company, also that orders were received from responsible parties which were not accepted by defendant. The referee allowed plaintiff commissions on all accepted orders made by parties on the line of his route with certain exceptions specified in the contract, and also upon such unaccepted orders. *Held*, no error; that the commissions were not limited to orders obtained and received by plaintiff; and that defendant had no right arbitrarily and without cause to reject orders from *bona fide* purchasers. *Taylor v. Morgan's Sons Co.*, 184
12. Plaintiff, who was entitled to a share in the estate of C., presented a claim against his executor B. for the alleged negligent failure of the latter to rent certain real prop-

erty belonging to said estate. In consideration of the payment to her by B. of her share in the estate and his parol agreement that he would leave her a share of his own estate, equal to that he should leave H. and K., and that it would amount to more than sufficient to compensate her for any loss she had sustained, plaintiff conveyed to B. her interest in the estate and executed a written release of all claims against B. on account of the loss of rent. B. died, leaving a will, by which he gave to H., K. and plaintiff \$1,000 each; his residuary estate he directed to be distributed according to law. H. and K. took each a one-twelfth interest in said residue. In an action against B.'s executors to recover damages for an alleged breach of the parol agreement, *held*, that the release of the claim for rents was a good consideration therefor; that it was not necessary for plaintiff to show that B. had been negligent in not renting the property, or that a valid claim existed against him for the loss of the rents. *Andrews v. Brewster.* 433

13. Also *held*, that the written release was not the repository of the whole agreement between the parties, but simply a part of it, hence plaintiff was not precluded thereby from proving the other part under the rule excluding parol evidence tending to vary or contradict a written contract. *Id.*

14. The trial court, at defendant's request, charged the jury that the only agreement they could find was that B. had agreed to leave plaintiff by his will a share of his estate equal to that which he should leave H. and K. This was not excepted to. The court, however, refused to charge that plaintiff could not recover more than an amount to which, under the will, H. and K. were entitled; but charged that she could recover, irrespective of what H. and K. received, the amount of her claim for lost rent, with interest. A verdict was rendered for the full amount of the claim. The General Term modified the verdict by allowing, in case plaintiff should by stipulation consent

thereto, a recovery for an amount equal to one-third of the residuary estate with interest. *Held*, that both rulings were error. *Id.*

15. S., defendant's testator, agreed with W., his nephew, plaintiff's assignor, that if he would refrain from drinking liquor, using tobacco, swearing and playing cards or billiards for money until he should become twenty-one years of age he would pay him \$5,000. W. performed his part of the agreement; he became of age in 1875. Soon thereafter he wrote to S. advising him of such performance, stating that the sum specified was due him, and asking payment. S. replied admitting the agreement and the performance and stating that he had the money in bank, set apart, which he proposed to hold for W. until the latter was capable of taking care of it. It was thereupon agreed between the parties that the money should remain in the hands of S. on interest. In an action upon the agreement, *held*, that it was founded upon a good consideration and was valid and enforceable. *Hamer v. Sidway.* 538

16. It is not essential in order to make out a good consideration for a promise to show that the promisor was benefited or the promisee injured; a waiver on the part of the latter of a legal right is sufficient. *Id.*

17. S. died in 1887 without having paid any portion of the sum agreed upon. *Held*, that under the agreement made in 1875, the relation of the parties thereafter was not that of debtor and creditor, but of trustee and *cestui que trust*; and that, therefore, the claim was not barred by the Statute of Limitations. *Id.*

18. Plaintiff contracted to perform certain work for defendant, and to finish the same at a time specified. The contract fixed a sum as damages for each day the work remained unfinished beyond that specified. In an action upon the contract it appeared that there had been a substantial breach of the contract on plaintiff's part,

such as to entitle defendant to be relieved from its obligations. *Held*, the latter could not repudiate the contract for the purpose of barring plaintiff's claim for his work, and at the same time seek to make it effectual for the recovery of damages for its breach; and as it appeared that the amount of work done by plaintiff exceeded the amount of damages, that a judgment dismissing the complaint and awarding defendant the full amount of damages was error. *Lennon v. Smith*. 578

19. *It seems* that if it had appeared that the damages exceeded the price or value of the work done by plaintiff, defendant would have been entitled to judgment for the excess. *Id.*

See COVENANT.

LIMITATION OF ACTIONS.

SALES.

STATUTE OF FRAUDS.

CONVERSION (EQUITABLE).

See EQUITABLE CONVERSION.

CORPORATIONS.

1. *It seems* that jurisdiction to appoint a receiver of a corporation upon its dissolution is wholly statutory. Such a receiver is the representative of the corporate body and in this state he is vested with the title to and is made trustee of the corporate property, and for the purpose of administering thereon and winding up the affairs of the corporation, he succeeds to its powers and franchises and possesses generally all the powers and authority conferred by statute upon the assignees of insolvent debtors. *Decker v. Gardner*. 334

2. The power, however, of appointing a receiver, *pendente lite*, is incidental to the jurisdiction of a court of equity. Such a receiver is a mere temporary officer of the court; he does not possess the power of a permanent receiver or any legal power except such as is specifically conferred upon him by order of the court; his functions

are limited to the care and preservation of the property committed to his charge. *Id.*

3. While a receiver appointed *pendente lite*, in an action to foreclose a railroad mortgage, is charged with the duty of operating the road pending the action, the corporation is not dissolved by the appointment; the receiver does not represent the corporation in its individual or personal character, or supercede it in the exercise of its corporate powers, except so far as the mortgaged property is concerned, and in every respect except the possession and management of the mortgaged property the corporation is free to exercise its franchises. *Id.*

4. A corporation is bound to carry on its business under a proper system and under reasonable rules and regulations, and if, through a failure to establish such system or to make such rules, a servant is injured, the corporation is liable. *Ford v. L. S. & M. S. R. Co.* 493

See MANUFACTURING CORPORATIONS.
MUNICIPAL CORPORATIONS.
RAILROAD CORPORATIONS.
TELEGRAPH COMPANIES.

COSTS.

— When "damages by way of costs for the delay" (Code Civ. Pro. § 3251, subd. 5), properly awarded by the Court of Appeals against an unsuccessful appellant.

See Jackson v. City of Rochester.
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COUNTIES.

1. In 1871 the town of I. pursuant to the provisions of the act of 1866 (Chap. 433, Laws of 1866), issued its bonds in aid of the construction of a railroad through the town. The state and county taxes collected from the railroad company upon the assessed valuation of its property in the town from the years 1872 to 1887 were paid over to the county treasurer, who used them in the payment of state taxes and county indebtedness, and no money was set apart by him as a

sinking fund to pay the bonds so issued. The town taxes so assessed and collected were paid over to the supervisor of the town and used by him in paying town expenses. Said bonds were paid by the town from moneys raised by general tax on property in the town, including that of the railroad company. Upon a case submitted under the Code of Civil Procedure (§ 1279), *held*, that the town was entitled to recover of the county the amount of the state and county taxes so paid to the county treasurer within six years prior to the submission; and that the failure of the town to pay over the amount of town taxes collected from the railroad company did not establish a waiver or constitute an estoppel. *Crowninshield v. Bd. Suprs.* 583

2. Also *held*, that the county was not entitled to have the stock of the railroad company, received by the town in exchange for its bonds, sold and the proceeds applied in payment of said bonds; that the town had the absolute right to have the sinking fund provided for by law applied in payment of the bonds without regard to the stock. *Id.*

COURTS.

See APPEAL.
GENERAL TERM.
SURROGATE'S COURT.

COVENANTS.

1. The primary rule for the interpretation of a covenant, as well as other contracts, is to gather the intention of the parties from the words, by reading not simply a single clause, but the entire context, and, where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered. *Clark v. Devoe.* 120
2. A deed from defendant of a lot in the city of New York, after reciting that the grantor was the owner of an adjoining lot, contained a covenant on his part, "for himself, his heirs, executors, administrators and assigns, * * * to and with the said party of the second part (the grantee), his heirs, executors, administrators and assigns, that he will not erect, or cause to be erected, on said lot * * * any building which shall be regarded as a nuisance, or which shall be occupied for any purpose which may render it a nuisance." Plaintiff, through various mesne conveyances, has acquired title to the lot conveyed. Defendant conveyed the adjoining lot by a deed which did not refer to said covenant, and contained no restriction or limitation upon the uses to which it might be put. Subsequently a building was erected thereon which was used as a livery stable so as to constitute a nuisance. Defendant neither caused nor permitted the nuisance. In an action upon the covenant, *held*, that it was personal to defendant, and solely against his own acts; that it did not make him liable for the acts of his grantees or subsequent owners; and so, that no cause of action was established against him. *Id.*
3. Covenants of seizin and of right to convey, in a deed of real estate executed by one who has no title, are broken by the delivery of the deed and become choses in action; they do not run with the land, and so, do not pass to subsequent grantees, without an assignment of the cause of action. *Mygatt v. Coe.* 212
4. Covenants of warranty and of quiet enjoyment entered into jointly by the owner of the fee and a stranger to the title, who does not assume any title in himself or right to convey, do not run with the land as against the stranger, and are not available in favor of a subsequent grantee who holds no assignment of the cause of action arising from a breach of the covenants. (BRADLEY, HAIGHT and BROWN, JJ., dissenting.) *Id.*
5. Defendant and his wife joined in a deed of real estate which one R. had assumed to convey to her and which was in her possession. The deed contained a joint covenant, on the part of defendant and his wife, that she was lawfully seized of an estate in fee, also joint covenants of warranty and of quiet enjoyment.

F., the grantee, entered into possession and thereafter executed a mortgage upon the premises. Subsequently L., who was in possession claiming title through various mesne conveyances under said deed, was ousted from the premises under a judgment in an action of ejectment brought by persons claiming title paramount to that conveyed by R. to defendant's wife. Thereafter plaintiffs, who were the holders of said mortgage, foreclosed the same, sold and bid in the premises under the judgment in the foreclosure suit. Upon their application the judgment of ejectment was opened and they were allowed to come in and defend, but failed in their defense and judgment was entered against them; they never at any time had possession of the premises. In an action brought by them upon the covenants in the deed to recover the amount of the mortgage, *held* (BRADLEY, HAIGHT and BROWN, JJ., dissenting), that the covenants did not run with the land as against defendant who was a stranger to the title; that he was not estopped from claiming that he occupied that position; and that, therefore, the said covenants were not available against him in favor of plaintiffs, no assignment of the cause of action arising from the breach having been made to them.

Id.

6. The authorities bearing upon the question as to what covenants run with land collated and discussed.

Id.

7. In an action for breach of a covenant against incumbrances in a deed of certain premises in the city of Brooklyn, executed by defendant to McL., plaintiffs' testator, in 1872, it appeared that prior to the execution of the deed the street in front of said premises had been improved pursuant to several acts of the legislature (Chap. 385, Laws of 1860; chap. 299, Laws of 1861; chap. 748, Laws of 1865; chap. 885, Laws of 1867; chap. 759, Laws of 1869; chap. 608, Laws of 1870), which provided among other things that, after the completion of the improvement, \$150,000 of its cost should be

"assessed equally upon the lands fronting upon said" street, and that such assessment, "unless previously paid," should, with interest thereon, be included in the annual taxes to be levied upon such lands, and one-twentieth part of such assessment be levied and collected annually for twenty successive years, beginning with the year after the completion of the improvement. No provision was made for notice to the lot owners; nor was a method prescribed of ascertaining the amounts chargeable upon the different parcels of land. The improvement was completed in 1870. In the assessment-roll for that year the sum of \$550.12 was designated as the portion chargeable to the lots in question and the installment for that year was included with other taxes; this was paid by defendant; also the similar installment for 1871. It did not appear that any notice or opportunity to be heard was given to the property owners or that an assessment of the amount was in fact made by the city board of assessors. Plaintiffs claimed to recover the subsequent installments paid by McL. *Held*, that the burden was upon plaintiffs to prove that the assessment had been made and had become a charge or incumbrance on the property at the time of the conveyance; that as the determination of the amount to be assessed upon each lot was left by the legislature to others, the owners had a right to be heard; and, therefore, that the amount chargeable upon the lots in question was not legally ascertained and determined at the time of the delivery of the deed, so as to make it a charge or incumbrance within the meaning of the covenant and, so, that the action was not maintainable. *McLoughlin v. Miller.* 510

CREDITOR'S SUIT.

1. While the recovery of a judgment and the return of an execution issued thereon unsatisfied are essential prerequisites to the maintenance of an action in the nature of a creditor's bill under the statute (2 R. S. 173, § 38; Code Civ. Pro. § 1871), and while, as a general

- thing, the same rule is applied to actions in equity, having in their purpose or the relief sought the nature of statutory creditor's bills, it does not extend so far as to deny to a creditor the interposition of the equity powers of the court where the situation is such as to render it impossible for him to take those preliminary steps. *Nat. Traders' Bank v. Wetmore.* 241
2. In an action by plaintiff, as a creditor of W., to set aside as fraudulent, a deed of real estate made by W. to his wife through a third person, of land in this state, it appeared that W., who resided in Connecticut, having become insolvent, made an assignment for the benefit of creditors to a citizen of that state. Plaintiff brought actions there upon his claims against W., who died while they were pending. His assignor was appointed administrator of his estate, and upon plaintiff seeking to revive and continue the actions against said administrator, the court directed that the actions abate and be discontinued. According to the prescribed practice in said state, the probate court appointed commissioners in insolvency, to whom plaintiff's claims were presented; they settled and fixed the amount thereof. The assets were insufficient to pay the expenses of the settlement of the estate and the preferred claims. The trial court found that the deed in question was made after W.'s indebtedness to plaintiff accrued, without consideration and with intent to defraud his creditors, and that at the time of his death, W. had no title to any property, real or personal, in this state. Defendant claimed that as no execution had been issued and returned unsatisfied, founded upon any judgment recovered by plaintiff, this action could not be maintained. *Held* (FOLLETT, Ch. J., dissenting), untenable; that the situation being such as to render it impossible for plaintiff to recover a judgment upon which execution could be issued, a court of equity had power to grant relief. *Id.*
 3. Also *held*, that the determination of the commissioners became as conclusive and binding upon the trustee as if it had been a recovery by action against him in a court of law. *Id.*
 4. Also *held* (FOLLETT, Ch. J., dissenting), that as under the laws of Connecticut, real estate not within that state was exempted from the operation of the assignment, the assignee could not as a representative of the creditors, bring an action in this state under the act of 1858 (Chap. 314, Laws of 1858) to reach the lands in question. *Id.*
 5. *It seems* that as plaintiff had no lien upon the property he could not, after the death of W., obtain any preference over his other creditors; and that his action can be only effectual as one for the benefit of himself and the other creditors. *Id.*
 6. The complaint proceeded solely in behalf of the plaintiff and demands relief for its benefit alone. A final judgment was directed by the trial court in plaintiff's favor, which the General Term reversed, and directed final judgment for defendant. *Held*, error, so far as the direction for final judgment is concerned; that assuming there was a defect in the pleadings it was available only by demurrer or answer (Code Civ. Pro. §§ 488, 499); that as it was not so presented and as defendant answered, the judgment to be directed was not controlled by the relief demanded, and the court could direct such judgment as would be proper upon the facts in favor of plaintiff and other creditors. *Id.*
 7. In an action to set aside a deed from B., plaintiff's ancestor, to defendant R., also a deed from R. to defendant A., and a mortgage from the latter to defendant L., it was found that R. obtained his deed by fraud and undue influence, but that A. purchased in good faith relying on R.'s record title and possession. It appeared that a prior action was brought against R. to set aside a former deed of the premises from B. to him, on the same ground, in which action a notice of pendency was filed; a final judgment was entered therein

dismissing the complaint, and said *lis pendens* was canceled by order of the court. It did not appear that A. knew of the former judgment. It was claimed that A. was chargeable with either statutory or implied notice of the infirmity of his title. *Held*, untenable; that the *lis pendens*, when canceled, ceased to be a statutory notice; and that the omission of A. or L. to search for the papers filed in that action was not negligence or evidence of bad faith on their part. *Valentine v. Austin*.

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8. In an action by a creditor, after obtaining a judgment setting aside an assignment for the benefit of creditors, as fraudulent, against a preferred creditor, who had been paid the amount of his preferred claim by the assignee before the bringing of said action to set aside the assignment, to recover back the money paid, *held*, that knowledge on the part of defendant at the time of the payment that a suit was then pending in behalf of creditors, other than the plaintiffs, to set aside the assignment, did not prejudice defendant; that such other action was in its effect and result only available to the plaintiffs therein. *Knower v. Central Nat. Bank*.

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9. The mere fact of knowledge on the part of the creditor so paid of the intent of the debtor to defraud his other creditors by the disposition of his property in payment of the debt, does not prejudice the right of the creditor to seek and obtain payment. *Id.*

DAMAGES.

1. In an action to recover a balance claimed to be due upon the purchase and sale by O., C. & Co., plaintiff's assignors, for defendant, of stocks purchased and carried upon margins, it appeared that in filling defendant's orders, O., C. & Co., made its purchases and sales, without his knowledge, through brokers in New York, who did not know that defendant was interested in the transaction, but who bought and paid for the

stock ordered and carried them on margins for O., C. & Co. On August fifteenth, defendant directed O., C. & Co. to sell certain shares of stock so purchased for him at a price stated; this price could have been obtained until August twentieth, when the stock went down. O., C. & Co. neglected to sell as directed and did not notify defendant of such neglect until August twenty-ninth. On October seven, O., C. & Co. made a general assignment to plaintiff for the benefit of creditors; the brokers in New York sold the stock carried for defendant without his knowledge; he was not at that time in default to O., C. & Co. The referee found that defendant never assented to, waived or acquiesced in the failure of O., C. & Co. to sell as directed, and allowed him as damages the difference between the price at which he ordered the sale and the price at which said stock was sold. *Held*, no error; that defendant was not required, when he learned that his instructions to sell had not been executed, to notify O., C. & Co. that he abandoned all claim to the stock and held them responsible for its value; nor was he under any obligation, in order to protect his defaulting agents, to pay the purchase-price, take the certificates and sell them; and that the correct rule of damages was adopted. *Allen v. McConihe*. 342.

2. Plaintiff, who was entitled to a share in the estate of C., presented a claim against his executor B. for the alleged negligent failure of the latter to rent certain real property belonging to said estate. In consideration of the payment to her by B. of her share in the estate and his parol agreement that he would leave her a share of his own estate, equal to that he should leave H. and K., and that it would amount to more than sufficient to compensate her for any loss she had sustained, plaintiff conveyed to B. her interest in the estate and executed a written release of all claims against B. on account of the loss of rent. B. died, leaving a will, by which he gave to H., K. and plaintiff \$1,000 each; his residuary estate he di-

rected to be distributed according to law. H. and K. took each a one-twelfth interest in said residue. In an action against B.'s executors to recover damages for an alleged breach of the parol agreement, the trial court, at defendant's request, charged the jury that the only agreement they could find was that B. had agreed to leave plaintiff by his will a share of his estate equal to that which he should leave H. and K. This was not excepted to. The court, however, refused to charge that plaintiff could not recover more than an amount to which, under the will, H. and K. were entitled; but charged that she could recover, irrespective of what H. and K. received, the amount of her claim for lost rent, with interest. A verdict was rendered for the full amount of the claim. The General Term modified the verdict by allowing, in case plaintiff should by stipulation consent thereto, a recovery for an amount equal to one-third of the residuary estate, with interest. *Held*, that both rulings were error. *Andrews v. Brewster*. 438

3. Plaintiff contracted to perform certain work for defendant, and to finish the same at a time specified. The contract fixed a sum as damages for each day the work remained unfinished beyond that specified. In an action upon the contract it appeared that there had been a substantial breach of the contract on plaintiff's part, such as to entitle defendant to be relieved from its obligations. *Held*, the latter could not repudiate the contract for the purpose of barring plaintiff's claim for his work, and at the same time seek to make it effectual for the recovery of damages for its breach; and as it appeared that the amount of work done by plaintiff exceeded the amount of damages, that a judgment dismissing the complaint and awarding defendant the full amount of damages was error. *Lennon v. Smith*. 578

4. *It seems* that if it had appeared that the damages exceeded the price or value of the work done by plaintiff, defendant would have

been entitled to judgment for the excess. *Id*.

5. Municipal corporations, engaged in the performance of works of a public nature authorized by law, are not liable for consequential damages occasioned thereby to others, where private property is not directly encroached upon, unless such damages are caused by misconduct, negligence or unskillfulness. *Atwater v. Trustees, etc.* 602
6. Where, therefore, defendant, while engaged in building a bridge, in pursuance of statutory authority, erected a coffer-dam in the outlet of a lake, which was necessary for the work, which obstructed the flow of the water from the lake and caused it to remain on plaintiff's land, and substantially deprived him of its beneficial use for one season, *held*, it appearing that the work was properly and expeditiously done, that defendant was not liable for the damages; that there was not a taking of plaintiff's property within the meaning of the constitutional provision prohibiting such taking without compensation. *Id*.

—When "damages by way of costs for the delay" (Code Civ. Pro. § 3251, *subd.* 5), properly awarded by the Court of Appeals against an unsuccessful appellant.

See Jackson v. City of Rochester. 624

DEBTOR AND CREDITOR.

1. A chattel mortgage not accompanied by immediate delivery or followed by an actual or continued change of possession of the chattels mortgaged, and which was executed upon an agreement that the mortgagor may remain in possession and sell the property and use the avails in substantially the same manner as before the execution of the mortgage, is void as against the creditors of the mortgagor. *Manderille v. Avery*. 376
2. The term "creditors" includes all persons who were such while the chattels remained in the possession of the mortgagor under

the agreement, and their rights are not affected by the fact that they did not obtain judgment or a specific lien until after delivery of the property to the mortgagee.

Id.

8. The right of the creditor to collect his debt out of the mortgaged chattels may not be defeated by the mortgagee simply by selling the property.

Id.

4. An assent by a creditor to such an arrangement between the mortgagor and mortgagee, which would preclude him from asserting his rights as a creditor against the mortgaged property, must be such as to create against him an equitable estoppel, or it must exist in agreement supported by a valid consideration.

Id.

5. Where an alleged assent was made upon condition that the mortgagor should return to the creditor a portion of the goods purchased of him, the purchase-price for which constituted the indebtedness, and would make payments to the mortgagee, neither of which conditions were complied with, *held*, that there was no consideration for the assent; and so, it was not binding.

Id.

6. A creditor may not be deprived of his legal right to attack a chattel mortgage as fraudulent by an agreement made with his agent, waiving or surrendering such right, without evidence that he knew of the defect in the mortgage, and had authorized the agent to make the agreement, or had acquiesced in it when made.

Id.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.
CREDITOR'S SUIT.

DECEIT.

See FRAUD.

DEED.

1. C., by his will, devised one-third of his real estate to his son J., one-

third to his son J. C., and the remaining third to J. C., provided that he should survive his wife or should have a lawful child who should live to the age of twenty-one; in case neither of these events happened, then he gave the said one-third to J. J. deeded all his estate, right and interest in certain premises of which the testator died seized to J. C.; the latter died before his wife, and he had no child who lived to the age of twenty-one. In an action of ejectment, *held*, that J. had a future expectant estate in the one-third, not absolutely devised to him, or his brother, which was alienable, and that this estate, with the one-third absolutely devised to him, was conveyed by his deed to J. C. (1 R. S. 723, § 10, 725, § 35.) *Griffin v. Shepard.* 70

2. A deed from defendant of a lot in the city of New York, after reciting that the grantor was the owner of an adjoining lot, contained a covenant on his part, "for himself, his heirs, executors, administrators and assigns, * * * to and with the said party of the second part (the grantee), his heirs, executors administrators and assigns, that he will not erect, or cause to be erected, on said lot * * * any building which shall be regarded as a nuisance, or which shall be occupied for any purpose which may render it a nuisance." Plaintiff, through various mesne conveyances, has acquired title to the lot by a deed which did not refer to said covenant, and contained no restriction or limitation upon the uses to which it might be put. Subsequently a building was erected thereon which was used as a livery stable so as to constitute a nuisance. Defendant neither caused nor permitted the nuisance. In an action upon the covenant, *held*, that it was personal to defendant, and solely against his own acts; that it did not make him liable for the acts of his grantees or subsequent owners; and so, that no cause of action was established against him. *Clark v. Devos.* 120

3. Covenants of seizin and right to convey, in a deed of real estate executed by one who has no title, are

broken by the delivery of the deed and become choses in action; they do not run with the land, and so, do not pass to subsequent grantees, without an assignment of the cause of action. *Mygatt v. Coc.* 212

4. Covenants of warranty and of quiet enjoyment entered into jointly by the owner of the fee and a stranger to the title, who does not assume any title in himself or right to convey, do not run with the land as against the stranger, and are not available in favor of a subsequent grantee who holds no assignment of the cause of action arising from the breach of the covenants. (BRADLEY, HAIGHT and BROWN, JJ., dissenting.) *Id.*

5. Defendant and his wife joined in a deed of real estate which one R. had assumed to convey to her and which was in her possession. The deed contained a joint covenant, on the part of defendant and his wife, that she was lawfully seized of an estate in fee, also joint covenants of warranty and of quiet enjoyment. F., the grantee, entered into possession and thereafter executed a mortgage upon the premises. Subsequently L., who was in possession claiming title through various mesne conveyances under said deed, was ousted from the premises under a judgment in an action of ejectment brought by persons claiming title paramount to that conveyed by R. to defendant's wife. Thereafter plaintiffs, who were the holders of said mortgage, foreclosed the same, sold and bid in the premises under the judgment in the foreclosure suit. Upon their application the judgment of ejectment was opened and they were allowed to come in and defend, but failed in their defense and judgment was entered against them; they never at any time had possession of the premises. In an action brought by them upon the covenants in the deed to recover the amount of the mortgage, *held* (BRADLEY, HAIGHT and BROWN, JJ., dissenting), that the covenants did not run with the land as against defendant who was a stranger to the title; that he was not estopped from claiming

that he occupied that position; and that, therefore, the said covenants were not available against him in favor of plaintiffs, no assignment of the cause of action arising from the breach having been made to them. *Id.*

6. In an action for breach of a covenant against incumbrances in a deed of certain premises in the city of B., executed by defendant to McL. plaintiff's testator, in 1872, it appeared that prior to the execution of the deed the street in front of said premises had been improved pursuant to several acts of the legislature (Chap. 335, Laws of 1860; chap. 299, Laws of 1861; chap. 748, Laws of 1863; chap. 885, Laws of 1867; chap. 759, Laws of 1869; chap. 608, Laws of 1870), which provided among other things that, after the completion of the improvement, \$150,000 of its cost should be "assessed equally upon the lands fronting upon said" street and that such assessment, "unless previously paid," should, with interest thereon, be included in the annual taxes to be levied upon such lands and one-twentieth part of such assessment be levied and collected annually for twenty successive years, beginning with the year after the completion of the improvement. No provision was made for notice to the lot owners; nor was a method prescribed of ascertaining the amounts chargeable upon the different parcels of land. The improvement was completed in 1870. In the assessment-roll for that year the sum of \$550.12 was designated as the portion chargeable to the lots in question and the installment for that year was included with other taxes; this was paid by defendant, also the similar installment for 1871. It did not appear that any notice or opportunity to be heard was given to the property owners or that an assessment of the amount was in fact made by the city board of assessors. Plaintiffs claimed to recover the subsequent installments paid by McL. *Id.* that the burden was upon plaintiffs to prove that the assessment had been made and had become a charge or incumbrance on the property at the time of the

conveyance; that as the determination of the amount to be assessed upon each lot was left by the legislature to others, the owners had a right to be heard; and, therefore, that the amount chargeable upon the lots in question was not legally ascertained and determined at the time of the delivery of the deed, so as to make it a charge or incumbrance within the meaning of the covenant and, so, that the action was not maintainable. *McLaughlin v. Miller.* 510

7. Where fixed monuments are referred to in the description in a deed, which sufficiently locate and determine the premises conveyed, they will control courses and distances. *Muhler v. Ruppert.* 627

DEFENCES.

— *When former suit has been discontinued by consent of defendant the defense of former suit pending is not available to him in a subsequent action.*
See Hyatt v. Ingalls. 98

— *As to what amounts to a waiver of a defense of the Statute of Frauds.*
See Hamer v. Sidway. 538

DEFINITIONS.

The words "transactions and communications" in the provision of the Code of Civil Procedure (§ 829), prohibiting evidence as to personal transactions and communications between certain persons and a deceased person embrace every variety of affairs which can form the subject of negotiations, interviews or actions between two persons, and include every method by which one person can derive impressions or information from the conduct, condition or language of another. *Heyne v. Doerfler.* 505

DEVISEE.

— *As to liability of devisee to pay mortgage executed by his testator on land devised.*
See Hansell v. Patterson. 849

DISCONTINUANCE.

1. An application for leave to discontinue an action is addressed to the legal, not the arbitrary discretion of the court, and it may not be denied capriciously, but may be refused whenever circumstances exist which afford a basis for the exercise of legal discretion; in such a case the court has but to consider whether anything has occurred since the commencement of the action which would so far prejudice defendant's interest, in the event of a discontinuance, as to require a denial of the application. *Winans v. Winans.* 140
2. The rule which governs in ordinary cases is not to be strictly applied in actions for divorce: the rights of the parties to the record are not alone to be considered; the public is to be regarded as a party and must be so treated by the court, and for this reason the court is invested with a wider discretion in the control of such cases than of others. *Id.*
3. The plaintiff afterwards moved for leave to discontinue the action without payment of costs or allowance, or on such terms as the court might decree. The alleged contract of marriage was denied by defendant; it was not claimed by plaintiff that any marriage ceremony was ever performed, and, according to her evidence, the contract rested in parol, and was made when no witnesses were present. It appeared that some years before the commencement of this action and on the eve of defendant's marriage to another, plaintiff sought and succeeded in obtaining redress for an alleged injury not consistent with a claim of marriage; that defendant married and lived with another woman in the open relation of husband and wife for several years until her death; he thereafter married another woman, who was designated in the complaint as co-respondent, by whom he had, prior to the commencement of this action, one child. The motion was denied. *Held,* that the matter was within the discretion of the court, and so, not reviewable here. *Id.*

DIVORCE.

1. In an action for divorce, an order of reference was entered by consent of the court on stipulation of the parties. After one hearing before the referee, plaintiff moved to vacate the order, and to have the issue sent to a jury; this motion was denied. *Held*, that as plaintiff had waived her right of trial by jury, the motion was not a demand of a right, but a petition for a favor; and so, it presented a matter in the discretion of the court, the exercise of which was not reviewable here. *Winans v. Winans*. 140
2. The plaintiff afterwards moved for leave to discontinue the action without payment of costs or allowance, on such terms as the court might decree. The alleged contract of marriage was denied by defendant; it was not claimed by plaintiff that any marriage ceremony was ever performed, and, according to her evidence, the contract rested in parol, and was made when no witnesses were present. It appeared that some years before the commencement of this action and on the eve of defendant's marriage to another, plaintiff sought and succeeded in obtaining redress for an alleged injury not consistent with a claim of marriage; that defendant married and lived with another woman in the open relation of husband and wife for several years until her death; he thereafter married another woman, who was designated in the complaint as co-respondent, by whom he had, prior to the commencement of this action, one child. The motion was denied. *Held*, that the matter was within the discretion of the court, and so, not reviewable here. *Id.*

DOWER.

1. The will of T., a resident of Pennsylvania, contained devises of real estate in this state in trust, which were in contravention of the statute limiting the period of suspension of the power of alienation. The will gave to the wife of the testator certain goods and chat-

tels, a life estate in certain real estate and two-fifths of the income of his residuary estate, devised and bequeathed in trust, which included the lands in this state, which provisions were declared "to be in lieu, substitution and satisfaction of her dower, thirds and all other interest in my estate, real and personal, and mixed." The widow voluntarily elected to accept the provisions of the will. Upon a case submitted under the Code of Civil Procedure (§ 1279), *held*, that the widow by her election to take the provision made for her in the will, consented to all the terms and conditions annexed, and yielded any right inconsistent therewith; and, therefore, she was not entitled to dower, at least in the absence of any offer to surrender the benefit she had received under the will and to take what the law would allow her; that the frustration of the wishes of the testator, as to the disposition of the income from the realty in this state, did not permit the court to disappoint his expressed intentions as to dower therein. *Lee v. Tower*. 870

2. Where a marriage has been annulled by judicial decree, upon the ground that when it was contracted the husband had a former wife living, who had absented herself for more than five successive years immediately preceding the second marriage, without being known by him to be living, although until it was so annulled it was voidable only and not void (2 R. S. 139, § 6), and the cohabitation of the parties was not adulterous, and although both parties entered into the marriage in entire good faith, yet the wife is not entitled to dower in the real estate owned by the husband at the date of the decree. *Price v. Price*. 589

EASEMENT.

Only by the use of plain and direct language by a grantor will it be held that he created a right in the nature of an easement attached to one parcel of land, making another servient thereto for all time. *Clark v. Deroc*. 120

EQUITY.

1. Although a court of equity will not, as a general rule, lend its aid to either of the parties to an illegal contract, by enforcing its execution or rescinding it, when the parties are not equally guilty, and when the public interest is advanced by allowing the more excusable of the two to sue for relief, the courts will take cognizance of an action for that purpose, and will grant relief by setting aside the contract and restoring the injured party to his original position. *Dural v. Wellman.* 156
2. To establish a defense in such an action, it is not sufficient for defendant to show merely that the plaintiff is *particeps criminis*, but it must appear that they were *in pari delicto*, unless the contract be *malum in se.* *Id.*
3. A court of equity has power to relieve a party against forfeiture or penalty incurred by the breach of a condition subsequent, when no willful neglect on his part is shown, upon the principle that a party having a legal right shall not be permitted to avail himself of it for the purpose of injustice and oppression. *Noyes v. Anderson.* 175
4. The subjects of fraud and trusts are peculiarly matters of equity jurisdiction, which is comprehensive where other tribunals cannot afford relief, and want of it is not to be inferred from the novelty of the questions presented. *Nat. Tradesmen's Bank v. Wetmore.* 241
5. While the recovery of a judgment and the return of an execution issued thereon unsatisfied are essential prerequisites to the maintenance of an action in the nature of a creditor's bill under the statute (2 R. S. 173, § 38; Code Civ. Pro. § 1871), and while, as a general thing, the same rule is applied to actions in equity, having in their purpose or the relief sought the nature of statutory creditor's bills, it does not extend so far as to deny to a creditor the interposition of the equity powers of the court where the situation is such as to

render it impossible for him to take those preliminary steps. *Id.*

EQUITABLE CONVERSION.

Where a will expressly confers power upon the executor to convert real estate into money, and it is evident that the testator contemplated that it must be done for the purpose of carrying the will into effect, and it appears that in no other way can the intent of the testator be effectuated, the realty will be deemed to have been converted into personalty. *Frazer v. Trustees, etc.* 479

ESTOPPEL.

Where a penal bond recites that it was executed under seal, the obligor is estopped, in an action on the bond, from denying that it was so executed, when it appears that he knew the difference, in the legal effect, between sealed and unsealed instruments, that he read, subscribed and placed the instrument in the custody of the person interested in having it accepted, who attached the seal and delivered it to the obligee, and that the latter received and acted upon it in good faith, supposing it to have been executed under seal. *Mct. L. Ins. Co. v. Bender.* 47

— When licensee who has acknowledged validity of patent is estopped from questioning it. *See Hyatt v. Ingalls.* 93

EVIDENCE.

1. In an action to recover for iron and materials alleged to have been furnished one H. by C., H. & Co., plaintiffs' assignors, upon defendant's order, testimony was given to the effect that the bookkeeper of said firm daily weighed the iron, took an account of the work and made entries thereof in the firm books; the correctness of the items taken by him and to whose account they were applicable was proved by the foremen. Some of the members of the firm verified the charges, and evidence of persons who had made settlements of

their accounts upon the books was given as to the correctness of the accounts kept upon them. The books were then offered and received in evidence under defendant's exception. *Held*, no error. *Cobb v. Wells*. 77

2. Defendant's order was that C., H. & Co. deliver to H. "what materials * * * he may want for one hundred pumps." Defendant offered to prove the cost per pump of the only kind of pump for which materials were furnished, including all materials furnished for and the work done upon them, and that the amount of the claim largely exceeded the cost. This was excluded. *Held*, error. *Id.*

3. In an action upon an account against an estate for work and labor, goods sold, etc., it appeared that by an arrangement between plaintiff and defendants, the administrators of the estate, two persons were called in for the purpose of attempting a settlement of the claim; that at the request of one of them plaintiff made a statement of his claim, *i. e.*, as to the period of time he had worked for decedent and the value of his services, also the transactions between him and the decedent in reference to the other items of the account. Plaintiff, as a witness in his own behalf, and others were permitted to testify, under objection and exception, as to what was said by him on that occasion. The testimony was allowed for the purpose of showing admissions by defendants, who it appears, when the statement was made, sat by in silence, making no objection, except as to two or three items. G., one of the administrators, testified that he had no prior knowledge of any of the items. *Held*, that the reception of the testimony was error; that silence under the circumstances did not amount to an admission, and if it could be so considered it was not binding, as the statements related to past transactions, and so constituted no part of the *res gestæ*; also that as regards plaintiff's testimony it was incompetent under the Code of Civil Procedure (§ 829). *Davis v. Gallagher*. 487

4. The words "transactions and communications" in the provision of the Code of Civil Procedure (§ 829), prohibiting evidence as to personal transactions and communications between certain persons and a deceased person embrace every variety of affairs which can form the subject of negotiations, interviews or actions between two persons, and include every method by which one person can derive impressions or information from the conduct, condition or language of another. *Heyne v. Doerfler*. 505

5. Although, it must appear that the transaction or communication sought to be excluded was a personal one, it is not requisite to show that it was private or confined to the witness and deceased. *Id.*

6. Upon a reference of a claim by plaintiff against the estate of A. for the board and care of two relatives of A., and professional services as nurse rendered for A., the referee allowed plaintiff to testify, under objection and exception, that he conversed with A. in reference to said relatives boarding with him, in the presence of one of them, and that he was to receive \$200 therefor; also, that he was at the house of A. many times, and for several periods of consecutive days, and at those times no other person was generally there, except A.'s attending physician. *Held*, error. *Id.*

7. In an action by a servant to recover damages for a breach of the contract of employment, the complaint set up the contract of employment and alleged that plaintiff entered defendant's employ under it; that before its termination defendant, without right or cause, discharged him. The answer admitted the contract, denied the breach, alleged that plaintiff was discharged for cause, and separately specified twelve acts of plaintiff in alleged violation of the contract. Both parties gave evidence tending to sustain the allegations in their respective pleadings, and in addition thereto defendant offered to show other

acts of misconduct and unfaithful service on the part of plaintiff not alleged in its answer. This was, upon objection, excluded. *Held*, no error. *Linton v. U. Fireworks Co.* 533

8. In an action against a sheriff for a failure to return an execution within sixty days after its delivery to him, proof of the delivery and failure to return establishes *prima facie* plaintiff's right to recover the full amount defendant was commanded by the execution to collect. *Pach v. Gilbert.* 612

9. An account-book is only evidence of sales and dealings in the ordinary course of business, and not of a special contract under which a party claims to have paid a claim against him by crediting it upon an account he has against another party. *Griesheimer v. Tanenbaum.* 650

10. A party to a contract, the terms of which are in dispute, may not give in evidence his own statements, either oral or written, made subsequent to the contract in corroboration of his version of it. *Id.*

11. Defendants contracted to pay plaintiff for orders obtained for certain serial publications. In an action upon the contract, defendants claimed that the orders referred to meant orders given by persons accepting and paying for the whole or some part of the work subscribed for, and did not include those given by persons who refused to take and pay therefor in whole or in part. The referee allowed plaintiff to prove that many subscribers failed to perform their contracts by reason of defendants' delay in making delivery. *Held*, no error. *Newhall v. Appleton.* 668

12. Where a certificate of deposit issued by a bank contained no provision for the payment of interest, *held*, that in an action thereon against the bank testimony of an oral agreement made by the bank at the time of the deposit to pay interest was incompetent. *Read v. Bank of Attica.* 671

— *When a writing is not the repository of the whole of a parol agreement, but simply of a part, a party is not precluded thereby from proving the other part.*

See Andrews v. Brewster.

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See BURDEN OF PROOF. PRESUMPTIONS.

EXECUTORS AND ADMINISTRATORS.

1. The provisions of the Code of Civil Procedure in reference to the bringing of actions upon the bond of an executor or administrator provide three separate and distinct remedies, each independent of the other: First. Where an execution issued upon a surrogate's decree against the property of the executor or administrator has been returned wholly or partly unsatisfied (§ 2607); Second. Where letters have been revoked and a successor has been appointed (§ 2608); Third. Where letters have been revoked and no successor appointed (§ 2609). *Hood v. Hayward.* 1

2. The return of an execution unsatisfied is not essential to the maintenance of an action upon the bond of an executor whose letters have been revoked. (POTTER, J., dissenting.) *Id.*

3. Where the letters of one of two co-executors are revoked and no successor is required to carry out the express provisions of the will, and none is appointed, as the statute contemplates in such case that the survivor will perform all the duties of the trust (§ 2692), he is the successor of the removed executor within the meaning of the statute, and, as such, can bring an action upon the bond of the latter without the return of an execution unsatisfied. (POTTER, J., dissenting.) *Id.*

4. In such an action it appeared that plaintiff and the beneficiaries under the will had executed releases, to one of the two co-sureties upon the bond, from all liability under it to the extent of one-half the penalty thereof, the releases stating that

they were intended to operate as a satisfaction and discharge of one-half of the obligation of the bond so that the surety should be "released from all claim or demand for contribution on the part of his co-surety." Also, that they should not be construed as affecting in any manner any claim or demand against said co-surety. *Held*, that the releases did not operate to discharge the co-surety; but that he remained liable to the extent of one-half of the penalty of the bond.

Id.

5. The letters were revoked because of misappropriation of the funds of the estate by the removed executor. By the surrogate's decree upon the final settlement of his accounts he was directed to pay a sum exceeding the penalty of his bond. The surety was charged with interest upon one-half the penalty from the time of the misappropriation. *Held*, error; but that he was chargeable with interest from the date of the decree.

Id.

6. C., by his will, gave all his property to T., who was appointed executor, in trust to convert the same into money, invest the proceeds, pay the interest to the widow of the testator during life, and, upon her death, to divide the principal among his children. In a proceeding instituted by the widow, the plaintiff herein, for a final settlement of T.'s accounts as executor, the surrogate's decree charged him with a balance then in his hands; this balance it was decreed that "the said executor retain, invest and keep invested * * * according to the trust contained in the will." The decree did not in terms discharge the executor. Plaintiff thereafter applied for a further accounting, upon which it was adjudged that T. should pay into court the principal of the estate, and to plaintiff a balance of income due her. T. failed to pay as directed, and thereupon his letters were revoked. The complaint in this action, which was upon the bond given by T. as executor, alleged and it appeared that T. did not set apart any securities and made no investment

of the trust fund. The defense was that the effect of the original decree was to terminate T.'s duties as executor, and that thereafter he acted only as trustee, and for such action his sureties were not liable.

Held, untenable, that the retention by T. of the trust fund was not necessarily the act of a trustee as distinguished from that of an executor; that he did nothing to indicate that he treated the fund as held by him in any capacity other than that in which he had received it; that the duty in respect to investment having been imposed by the will, said decree might be treated as if it contained no direction in that respect, and the only practical effect of it was a settlement of T.'s account as executor; that it was entirely consistent therewith that the fund should be retained by T. in that capacity until invested; and that, therefore, the sureties were liable for his failure to obey the subsequent decree.

Cluff v. Day.

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7. To render a provision in a will effectual to furnish a greater security than that given by law for the payment of debts in due course of administration, by charging them upon the real estate of the testator, the purpose must quite clearly appear; a mere direction to pay debts out of the property will not suffice. *In re Powers*, 361

8. Under the act of 1837, concerning executors and administrators (§ 37, chap. 460, Laws of 1837), as amended in 1868 (Chap. 594, Laws of 1868), and under the Code of Civil Procedure, the running of the Statute of Limitations against a debt due an executor or administrator from, or any cause of action in his favor against, the decedent, is suspended from the time of the death of the latter until the first judicial settlement of the accounts of the executor or administrator; and this, without regard to the number of years embraced in that period. *Id.*

9. Where, therefore, fourteen years elapsed between the death of the decedent and the first judicial settlement of an executor's accounts,

held, that debts due him from the decedent, which were not barred by the statute at the time of the death of the latter, were properly allowed the executor. *Id.*

10. The will of M. devised to her executor one-third of her residuary estate in trust, to receive the rents and income and apply the net proceeds to the use of a beneficiary named during life, and, on the death of the beneficiary, gave the property to her children, each of the other two-thirds was disposed of in a similar manner. The testatrix authorized her executor, at any time before final division and settlement of her estate, whenever he should deem proper for any "purpose which in his discretion may render it advisable so to do," to sell any part or portion thereof. The executor sold certain of the residuary real estate. Upon settlement of his accounts, certain claims presented by him against the estate were proved and allowed, and after applying the proceeds in his hands of the residuary personal estate, there remained a balance due him. *Held*, that the proceeds of the sales of the real estate were properly treated as assets in his hands, applicable to the payment *pro tanto* of his claims. *Id.*

11. Upon the accounting of executors, the surrogate refused to credit them with \$250 paid to a commandery of which the testator was a member, for parading at his funeral, and which did not appear to have been demanded by it as a condition of participation. *Held*, no error. *In re Reynolds*. 388

12. The will of S., after providing for the payment of debts, etc., gave all her estate to her executors, in trust for her son, with directions that they carry on some business for his benefit. One of the executors alone qualified, who continued to carry on a business in which the testatrix had been engaged. In so doing he incurred debts to plaintiffs for goods purchased. In an action brought by them against the executor, as such, a judgment was recovered, which the defendant was directed to pay out of the

funds in his hands; which judgment was affirmed by this court (113 N. Y. 586). Pending the appeal to it an order was made appointing R. as receiver and directing defendant to transfer to him all the property of the estate in his hands; also directing said receiver to pay to plaintiffs the amount of said judgment, with interest and costs, and to hold the balance subject to the order of the court. Subsequently plaintiffs recovered another judgment, and by order the receivership was extended to the second action. C. thereafter recovered a judgment against defendant, as executor, whereby, after reciting the appointment of R. as receiver in the two former actions, it was adjudged that he, "after satisfying the obligations of the said prior receiverships," pay to C. the amount of his judgment. Pending an appeal from the order in plaintiffs' first action, orders were granted directing R. to pay out of the fund the amount of the second judgment; to retain sufficient to pay the first judgment during the pendency of the appeal therefrom, and to pay the balance on C.'s judgment. Which order R. complied with. The order in the first action was reversed (115 N. Y. 396), and thereupon R. paid to C. the balance in his hands, less his commissions and expenses. Subsequently, on motion of defendant, whereupon it appeared that S. was indebted, at the time of her death, to an amount largely exceeding the fund delivered to R., he was ordered to pay defendant the amount of the plaintiffs' first judgment, with interest from its date, and plaintiffs were ordered to refund to him the amount of their second judgment so paid to them, and the amount retained by the receiver for commissions, etc. *Held*, that while R. was protected so far as the payments were made by him pursuant to the orders, he had no specific directions to pay out the amount he had been directed to retain pending the appeal, as the direction in the order appointing him was defeated by its reversal; that the reversal did not authorize him to pay on the C. judgment the amount so retained, but he

held it simply subject to the direction of the court; that while plaintiffs' judgments established their claims against the estate, they had no right to appropriate to their payment the estate of the testatrix to the exclusion of her creditors; that the sum they were entitled to was dependent upon a distribution to be made by the surrogate; that defendant was so far the representative of the creditors of the estate, that he could, and it was his duty to take steps to have the fund restored to him with a view to its proper distribution; that the receiver was properly directed to pay over the amount of the first judgment so retained by him, but was not chargeable with interest, save from the time he made the payment therefrom to C.; that plaintiffs were not entitled to apply upon their second judgment the money paid to them by the receiver, and were properly required to refund it, but were not required to pay to defendant the commissions, etc., of the receiver, as they were included in the sum which the receiver was directed to restore to plaintiffs. *Willis v. Sharp*. 406

13. The mere fact that one of two or more executors or trustees is passive, and does not participate in the administration or interfere with the acts of his co-executors in taking possession of the property and collecting moneys of the estate, will not charge him with liability for waste by them; it must appear that he had some reason to apprehend that such might be the consequence of their acts. *Cocks v. Haviland*. 426

14. Defendant was one of six executors of a will; letters testamentary were issued to all; two of them, C. & B., took charge and possession of the estate and assumed to administer it. No portion of the assets came into defendant's hands, except what she received as the share of the residuary estate given her by the will, and she took no active part in the management. The will directed that the share of D., one of the beneficiaries and also one of the executors, should be invested by the executors upon bond and mortgage, the income

applied during his life to the support of his family, and on his decease the share to go to plaintiffs, his children. C. & B. divided the estate into shares as directed, and paid over to the beneficiaries, except D., their shares. At that time all of the beneficiaries were present. The property apportioned and set apart, as the share of D. was examined by him and handed over to B. to care for. It was not invested as directed by the will, but was misappropriated by C. & B. who were copartners. About eight years after the issuing of letters testamentary they failed. It did not appear that up to the time of the failure there was anything to excite suspicion that they were not prudent and reliable business men. In an action brought by plaintiffs to recover said share, *held*, that the facts did not justify a finding of such negligence, on the part of the defendant, as to render her liable. *Id*.

15. The will directed an investment for the testator's widow. The investment was not made by C. & B. as directed, but in another security. Defendant remonstrated against this at the time, but took no action to compel a proper investment; no loss resulted therefrom. Four years before the failure of C. & B., defendant knew that they had not made any other investment of the fund, and she then joined in an undertaking to the widow that her annuity should be paid. *Held*, that these facts were not sufficient to charge defendant with the want of due care and caution. *Id*.

16. An admission by an administrator or executor is not binding as against the estate, unless made while he was engaged in his representative capacity in the performance of a duty to which the admission was pertinent so as to constitute it a part of the *res gesta*. *Davis v. Gallagher*. 487

17. In an action upon an account against an estate for work and labor, goods sold, etc., it appeared that by an arrangement between plaintiff and defendants, the administrators of the estate, two

persons were called in for the purpose of attempting a settlement of the claim; that at the request of one of them plaintiff made a statement of his claim, *i. e.*, as to the period of time he had worked for decedent and the value of his services, also the transactions between him and the decedent in reference to the other items of the account. Plaintiff, as a witness in his own behalf, and others were permitted to testify, under objection and exception, as to what was said by him on that occasion. The testimony was allowed for the purpose of showing admissions by defendants, who, it appears, when the statement was made, sat by in silence, making no objection, except as to two or three items. *G.*, one of the administrators, testified that he had no prior knowledge of any of the items. *Held*, that the reception of the testimony was error; that silence under the circumstances did not amount to an admission, and if it could be so considered it was not binding, as the statements related to past transactions, and so constituted no part of the *res geste*; also that as regards plaintiff's testimony, it was incompetent under the Code of Civil Procedure (§ 829). *Id.*

FINDINGS OF LAW AND FACT.

Plaintiff's complaint alleged, in substance, that defendant had taken down a line fence between the lands of the parties and erected a new fence upon plaintiff's land, also that he had raised a dam on his land to a greater height than he was entitled to, thereby causing the water to overflow upon and injure plaintiff's lands. The relief asked for was that the defendant be required to return the fence to the proper line, to lower his dam, and for damages. The trial court found as a fact that the fence built by defendant was not upon plaintiff's land, but upon the line between his and defendant's land and marks the same; it found in favor of plaintiff as to the dam, and as a conclusion of law that the dam should be lowered as specified. The court refused to find, as a conclusion of law, as re-

quested by defendant, that the latter was entitled to a judgment declaring that the fence in question "is not upon plaintiff's land, but upon the line between plaintiff's and defendant's lands." The judgment recited none of the facts found, except such as were favorable to plaintiff, and it contained no adjudication upon the issue relating to the division fence. *Held*, error; that the issue as to the fence was a material one, and defendant was entitled to the fruit of the finding of facts in his favor by having such an adjudication made as would, by matter of record, estop the plaintiff from reopening the controversy; and that as the complaint could not be dismissed upon the merits, plaintiff having succeeded in part, defendant's only protection was an express direction for judgment in his favor, to the extent required by the facts found. *Outwater v. Moore.* 66

FORECLOSURE.

1. In an action for the foreclosure of a mortgage, defendant A., the owner of the equity of redemption, set up as a defense an agreement whereby for a good consideration plaintiff agreed that no proceedings would be instituted to enforce the mortgage, which was then due, until one year after the death of A., provided that during said period prior mortgages upon the same property, which with plaintiff's mortgage exceeded its value, remained unenclosed and no interest thereon unpaid for more than thirty days after due "and so long as no taxes or assessments on the said premises remain unpaid and in arrears for more than thirty days." The complaint was filed April 27, 1887. An assessment of \$23.08 for a sewer, made and confirmed in March, 1886, remained unpaid. Defendant alleged that she did not know of said assessment until about April 28, 1887, the day before the service, when she promptly caused it to be paid. The court found that such non-payment was due to the negligence of A.'s son, with whom A., she being absent, had left money sufficient to make the payment. It

appeared that when he paid the taxes in 1886, he was informed by some one at the tax office that nothing was due or in arrears against the property. The court directed judgment for plaintiff. *Held* (FOLLETT, Ch. J. and PARKER, J., dissenting), error; that the default plaintiff seeks to avail himself of would result in a forfeiture, from which or its consequences a court of equity had power to relieve. *Noyes v. Anderson*. 175

2. An undertaking given on appeal to the General Term, from a decree in a foreclosure suit, instead of being in the form prescribed by the Code of Civil Procedure (§ 1331), for an undertaking to stay proceedings in such an action was in the form prescribed (§ 1327) to stay execution on a money judgment. Plaintiff's attorneys accepted the undertaking and did not take proceedings to enforce the decree pending the appeal; this resulted in an affirmance, but during its pendency the property was sold pursuant to a decree of foreclosure and sale founded on a prior mortgage. In an action upon the undertaking, *held*, that while it was valid as a common-law agreement, and enforceable according to its terms, as no sum was recovered or directed to be paid by the judgment appealed from, the defendants were not liable beyond the amount of costs; that their agreement could not be enlarged so as to embrace the payment of the amount decreed to be paid out of the proceeds of the sale of the real estate; and so, that a recovery of this amount was error. *Concordia S. & A. Assn. v. Read*. 189

3. While a receiver appointed *pendente lite*, in an action to foreclose a railroad mortgage, is charged with the duty of operating the road pending the action, the corporation is not dissolved by the appointment; the receiver does not represent the corporation in its individual or personal character, or supercede it in the exercise of its corporate powers, except so far as the mortgaged property is concerned, and in every respect except the possession and manage-

ment of the mortgaged property the corporation is free to exercise its franchises. *Decker v. Gardner*. 834

FORFEITURE.

1. A court of equity has power to relieve a party against forfeiture or penalty incurred by the breach of a condition subsequent, when no willful neglect on his part is shown, upon the principle that a party having a legal right shall not be permitted to avail himself of it for the purpose of injustice and oppression. *Noyes v. Anderson*. 175

2. In an action for the foreclosure of a mortgage, defendant A., the owner of the equity of redemption, set up as a defense an agreement whereby for a good consideration plaintiff agreed that no proceedings would be instituted to enforce the mortgage, which was then due, until one year after the death of A., provided that during said period prior mortgages upon the same property, which with plaintiff's mortgage exceeded its value, remained unforced, and no interest thereon unpaid for more than thirty days after due "and so long as no taxes or assessments on the said premises remain unpaid and in arrears for more than thirty days." The complaint was filed April 27, 1887. An assessment of \$23.08 for a sewer, made and confirmed in March, 1886, remained unpaid. Defendant alleged that she did not know of said assessment until about April 28, 1887, the day before the service, when she promptly caused it to be paid. The court found that such nonpayment was due to the negligence of A.'s son, with whom A., she being absent, had left money sufficient to make the payment. It appeared that when he paid the taxes in 1886, he was informed by some one at the tax office that nothing was due or in arrears against the property. The court directed judgment for plaintiff. *Held* (FOLLETT, Ch. J., and PARKER, J., dissenting), error; that the default plaintiff seeks to avail himself of would result in a forfeiture, from which or its consequences a court of equity had power to relieve. *Id*.

FORMER ADJUDICATION.

1. In an action against heirs to collect a balance due upon a mortgage executed by McC., their ancestor, it appeared that the latter by his will devised his real estate. By the judgment in an action brought by one of the heirs for the partition of said real estate the devise was adjudged to be void. Plaintiffs' testator brought an action against McC.'s executors, the defendants here and others, to vacate said judgment, and for direction that the executors sell sufficient of the real estate to pay his debt. Upon demurrer the complaint therein was dismissed. *Held*, that this did not sustain the defense of a former adjudication. *Hauselt v. Patterson*. 349

2. In an action brought by a receiver appointed in supplementary proceedings to have two chattel mortgages covering the same property executed by the debtor set aside as fraudulent, and to compel the defendant A., the mortgagee in one of the mortgages and the assignor of the other, to account for and pay over the proceeds of sale of the mortgaged property, A. pleaded the pendency of a former suit in bar. That was an action brought by A. to recover possession of the property which had been levied upon under an attachment issued in favor of the judgment creditor against the debtor. Defendant in that action justified under the attachment, and alleged "that any transfer of said goods to the plaintiff was in fraud of creditors and void." The judgment therein decided that A. was the owner and entitled to the possession of the property. This judgment was reversed on appeal, and the action was still pending. One of the mortgages was shown to be fraudulent and void. *Held*, that the pending of the former action was not a bar to the recovery of the proceeds of the property sold to satisfy the void mortgage; that to establish his right to recover in that action, A. was only required to show one valid mortgage, and so, that the invalidity of the other

was not necessarily involved. *Mandeville v. Avery*. 378

— *When former suit has been discontinued by consent of defendant the defense of former suit pending is not available to him in a subsequent action. See Hyatt v. Ingalls*. 93

— *Where, in pursuance of the laws of the state of Connecticut, commissioners of insolvency have determined the amount due on a claim against an insolvent debtor, this is conclusive and binding against assignee for benefit of creditors. See N T. Bank v. Wetmore*. 241

FRAUD.

1. *It seems* that contracts by one party to procure, for a consideration, a husband or wife for the other, are considered as fraudulent in their character, and the party paying the consideration will be regarded as under a species of imposition or undue influence. *Dural v. Wellman*. 156
2. *It seems*, that where one member of a firm sells out his interest in the firm to the other members, who continue the business with the firm property, and the sale is subsequently set aside for fraud, the out-going partner may require his copartners to account to him as trustees for the profits resulting from the business after his retirement. *White v. Reed*. 468
3. Where, however, the retiring partner received on the sale more than the amount of his interest in the capital or assets of the firm, he is not entitled to share in the subsequent profits; the fraud that induced the sale entitles him to full indemnity for any loss suffered thereby, but does not entitle him to recover upon an accounting. *Id*.
4. In an action to recover possession of goods sold and delivered to defendants on the ground that the sale was induced by false and fraudulent representations made by them, the burden is upon the plaintiff to establish that such representations were made with intent to deceive and defraud. *Coffin v. Hollister*. 644

FRAUDS (STATUTE OF).

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCES

1. In an action by plaintiff, as creditor of W., to set aside as fraudulent, a deed of real estate made by W. to his wife through a third person, of land in this state, it appeared that W., who resided in Connecticut, having become insolvent, made an assignment for the benefit of creditors to a citizen of that state. Plaintiff brought actions there upon his claims against W., who died while they were pending. His assignor was appointed administrator of his estate, and upon plaintiff seeking to revive and continue the actions against said administrator, the court directed that the actions abate and be discontinued. According to the prescribed practice in said state, the probate court appointed commissioners in insolvency, to whom plaintiff's claims were presented; they settled and fixed the amount thereof. The assets were insufficient to pay the expenses of the settlement of the estate and the preferred claims. The trial court found that the deed in question was made after W.'s indebtedness to plaintiff accrued, without consideration and with intent to defraud his creditors, and that at the time of his death, W. had no title to any property, real or personal, in this state. Defendant claimed that as no execution had been issued and returned unsatisfied, founded upon any judgment recovered by plaintiff, this action could not be maintained. *Held* (FOLLETT, Ch. J., dissenting), untenable; that the situation being such as to render it impossible for plaintiff to recover a judgment upon which execution could be issued, a court of equity had power to grant relief. *Nat. Tradesmen's Bank v. Wetmore*. 241
2. A chattel mortgage not accompanied by immediate delivery or followed by an actual or continued change of possession of the chattels mortgaged, and which was executed upon an agreement that the mortgagor may remain in possession and sell the property and use the avails in substantially the same manner as before the execution of the mortgage, is void as against the creditors of the mortgagor. *Mandeville v. Avery*. 376
3. The term "creditors" includes all persons who were such while the chattels remained in the possession of the mortgagor under the agreement, and their rights are not affected by the fact that they did not obtain judgment or a specific lien until after delivery of the property to the mortgagee. *Id.*
4. The right of the creditor to collect his debt out of the mortgaged chattels may not be defeated by the mortgagee, simply by selling the property. *Id.*
5. An assent by a creditor to such an arrangement between the mortgagor and mortgagee, which would preclude him from asserting his rights as a creditor against the mortgaged property, must, be such as to create against him an equitable estoppel, or it must exist in agreement supported by a valid consideration. *Id.*
6. Where an alleged assent was made upon condition that the mortgagor should return to the creditor a portion of the goods purchased of him, the purchase-price for which constituted the indebtedness, and would make payments to the mortgagee, neither of which conditions were complied with, *held*, that there was no consideration for the assent; and so, it was not binding. *Id.*
7. A creditor may not be deprived of his legal right to attack a chattel mortgage as fraudulent by an agreement made with his agent, waiving or surrendering such right, without evidence that he knew of the defect in the mortgage, and had authorized the agent to make the agreement, or had acquiesced in it when made. *Id.*
8. Although the mortgagee may possess an honest claim, he cannot

retain, as against a pursuing creditor, property obtained by him under his mortgage if it is fraudulent; and although he took and sold the property by virtue of the mortgage before any lien was obtained thereon by the creditor he may be compelled by the latter to refund the proceeds; the mortgage being void, all proceedings under it are void. *Id.*

9. In an action to set aside a deed from B., plaintiff's ancestor, to defendant R., also a deed from R. to defendant A., and a mortgage from the latter to defendant L., it was found that R. obtained his deed by fraud and undue influence, but that A. purchased in good faith relying on R.'s record title and possession. It appeared that a prior action was brought against R. to set aside a former deed of the premises from B. to him, on the same ground, in which action a notice of pendency was filed; a final judgment was entered therein dismissing the complaint, and said *lis pendens* was canceled by order of the court. It did not appear that A. knew of the former judgment. It was claimed that A. was chargeable with either statutory or implied notice of the infirmity of his title. *Held*, untenable; that the *lis pendens*, when canceled, ceased to be a statutory notice; and that the omission of A. or L. to search for the papers filed in that action was not negligence or evidence of bad faith on their part. *Valentine v. Austin*. 400

See ASSIGNMENT (FOR BENEFIT OF CREDITORS).

GENERAL TERM.

1. In an action brought, among other things, to charge certain real estate with moneys alleged to have been wrongfully invested therein by the defendant, the complaint was dismissed; on appeal the General Term reversed the judgment and granted a new trial, but directed the complaint and notice of pendency to be amended by striking out all allegations concerning said real estate. No motion for an amendment had been made and the

record did not disclose the existence of any of the causes prescribed for the cancellation of the notice, or that counsel on either side were heard upon the question. *Held*, that the General Term had no power to direct the notice of pendency to be so amended as to cancel and destroy it. *Beman v. Todd*. 114

2. Where an action by a wife for a judicial separation from her husband on the ground of abandonment is determined in her favor, and the court as part of the final judgment, makes an allowance for the repayment of sums expended by plaintiff in her support and maintenance since the commencement of the action, the General Term has power to review the judgment in this respect, and to strike out the allowance as improvidently made. *Percival v. Percival*. 637
3. *It seems*, a General Term order striking out the allowance on the ground that the court below had no power to grant it, is error. *Id.*
4. It must appear, however, from the order that the action of the General Term in striking out the allowance was based on the ground of want of power in the court below to authorize this court to review it; the opinion may not be resorted to to determine the grounds of the decision. *Id.*

— *It seems where in an action for breach of contract the amount of damages is a question of law, the General Term, instead of granting a new trial, may modify verdict and direct judgment for the correct amount.*

See Andrews v. Brewster. 433

GRANTOR AND GRANTEE.

Only by the use of plain and direct language by a grantor will it be held that he created a right in the nature of an easement attached to one parcel of land, making another servient thereto for all time. *Clark v. Devoe*. 120

See DEED.

HEIRS.

1. The provision of the Revised Statutes (1 R. S. 749, § 4) requiring a devisee or heir to satisfy, out of his own property, a mortgage executed by his testator or ancestor upon real estate which has passed or descended to him, unless there is an express testamentary direction that such mortgage shall be otherwise paid, does not contemplate that the devisee or heir should be so liable irrespective of the property which descended to him, but rather that his liability to pay the mortgage should be measured by and not exceed the value of that property. *Hauselt v. Patterson.* 349
2. In an action under the statute to enforce the liability of the heirs or devisees they may allege in their answer and prove other debts of the decedent unsatisfied belonging to the same or prior class as that in suit, and properly chargeable against the land by reason of a deficiency of personality. (2 R. S. 453, §§ 39, 40; Code, § 1856.) *Id.*
3. The amount of the recovery in such an action must be in proportion to the value of the real estate which has descended to the defendants respectively; it is only when they have transferred the land that they are personally liable, and then only for an amount not exceeding its value. *Id.*
4. When the land has not been aliened by the heirs or devisees the remedy is by action in equity having the nature of a proceeding *in rem* to reach the land. (2 R. S. 454, § 47; Code Civ. Pro. § 1852.) *Id.*
5. The liability of the defendants is not joint, nor is the estate which has descended to any one of them subject to the proportion of the mortgage debt chargeable to any of the others. *Id.*
6. In an action against all the heirs or their representatives, except one, of McC., who died intestate as to his real estate, to recover a deficiency arising on foreclosure of a mortgage upon land of which he

died seized, it appeared that one-sixth of the real estate descended to the heir not a party, and that such interest was not represented by any defendant. A joint judgment against the defendants for the amount of the deficiency was rendered, neither the amount of the recovery nor the costs being apportioned; the judgment did not direct that its amount be levied upon the land which descended to the heirs. *Held*, error; that the defendants were chargeable only with five-sixths of plaintiff's claim, and for that amount only their interest in the real estate was subject to the levy of execution on the judgment; that the omission to plead the defect of parties defendant was a waiver merely of that defense, and did not increase the defendants' liability. Judgment, therefore, modified so as to charge the defendants with five-sixths of the amount of the recovery, and to direct the levy of it, duly apportioned upon the real estate which descended to defendants. *Id.*

7. Interest had been paid by McC. upon his bond accompanying the mortgage within twenty years prior to the commencement of the action. *Held*, that although the remedy was given by statute, the cause of action was founded upon the obligation of defendants' ancestor; and so, it was not barred by the Statute of Limitations. *Id.*

8. McC., by his will, devised his real estate. By the judgment in an action brought by one of the heirs for the partition of said real estate, the devise was adjudged to be void. Plaintiff's testator brought an action against McC.'s executors, the defendants here and others, to vacate said judgment, and for direction that the executors sell sufficient of the real estate to pay his debt. Upon demurrer the complaint therein was dismissed. *Held*, that this did not sustain the defense of a former adjudication. *Id.*

9. Defendant S. was sued as surviving trustee under the will of J., one of the heirs, who died in the state of New Jersey; her will was

admitted to probate in that state; it was recorded in the office of the surrogate of New York city and county, but not formally admitted to probate in this state. By said will J. devised to S. and G., as trustees, her real estate in this state in trust, giving the survivor power to execute the trust. *Held*, that in respect to the land, the trustee was subject to the equitable jurisdiction of the courts of this state; and so, was properly made a party; and that a refusal to dismiss the complaint as to him was not error. *Id.*

HIGHWAYS.

1. A highway, although properly laid out, if opened and worked for a part of the distance only, as described in the survey, after the lapse of more than six years, ceases, as to the part not opened, to be a highway for any purpose. *Horey v. Village of Haverstraw*. 273
2. *It seems*, the burden of showing that a portion has so ceased to be a highway rests upon the parties claiming it. *Id.*
3. The requirement of the statute (1 R. S. 520, § 99, as amended by chap. 311, Laws of 1861) that a highway must be opened and worked within six years, implies that it must be made passable as a highway for public travel; it need not be made a first class road, or be finished, but it must be worked sufficiently to enable the public to pass over it. *Id.*
4. So, also, where a road has not been used and traveled as a highway for six years and has for that period been made impassable for conveyances by being fenced off, or by excavations therein, its legal character as a highway is destroyed; and this, although in the beginning of the non-user the road was rendered impassable by a trespasser. *Id.*
5. In an action to recover damages for injuries alleged to have been caused by defendant's neglect to keep one of its streets in repair, it appeared that the street in question was regularly laid out, and up to the intersection with another street, was opened and worked; but that the portion where the accident happened was not worked and never had been used as a highway, and for more than six years had been closed by a fence across it, and there was no access thereto except from private property; also, that it had been rendered impassable for public travel by deep excavations therein, and that sand and clay were excavated therefrom and carried away by private parties, without hindrance from the town officials or the public. Plaintiff entered thereon from private property. *Held*, that the *locus in quo* was not a highway; and so, that plaintiff was not entitled to recover. *Id.*
6. The law requires a traveler on a highway, before crossing a railroad track, to look and listen for the approach of trains, and if he omits to do so and suffers injury, he cannot maintain an action against the railroad company, although it was guilty of negligence. *Tucker v. N. Y. C. & H. R. R. Co.* 308
7. Certain town assessors, not knowing of the repeal, by the act of 1872 (Chap. 355, Laws of 1872), of the provision of the Revised Statutes (1 R. S. 389, § 4, as amended by chap. 287, Laws of 1871) directing that a farm or lot lying in two towns or wards shall, if occupied, be assessed in the town or lot where the occupant resides, assessed a farm owned and occupied by plaintiff as so prescribed, and the commissioner of highways of the town, in making his assessment for highway labor, assessed plaintiff for highway labor on his whole farm in compliance with the provision of the statute (1 R. S. 506, § 24) requiring him to make his apportionment upon real estate "as the same shall appear upon the last assessment-roll of the town." Plaintiff worked out the tax at the demand of the overseer of the highways, but protested against its legality. *Held*, that an action was not maintainable against the commissioner to recover the value of the labor so rendered by plaintiff; as that of-

ficer had jurisdiction to assess plaintiff and simply obeyed the command of a valid statute. *Hampton v. Hamsher.* 634

HUSBAND AND WIFE.

1. *It seems*, articles of separation between a husband and wife in which another joins as trustee, although valid when made, are rendered void by the resumption of the conjugal relation. *Zimmer v. Settle.* 37
2. The wife of plaintiff, having brought an action against him for limited divorce, for the purpose of settling the action he paid to defendants \$400 and received their bond, conditioned that they would support and maintain the wife during life, and would forever save him harmless and exempt from any further liability therefor. At the time of the execution of the bond the wife had left her husband, and was living with defendant D., her father. She subsequently returned to her husband, became a member of his family, obtained clothing upon his credit, for which he was required to and did pay, and he supported her. *Held*, that an action to enforce the bond was not maintainable; that the bond having been executed in view of the separation, the obligation was dependent upon its continuance; that when the wife returned to her husband, resuming permanently her place as his wife, the cause which led to the contract ceased and the considerations upon which it rested disappeared, and this although the wife returned to her husband's home without his consent; that she had the right so to do and he was bound to receive her. *Id.*
3. *It seems* that plaintiff is entitled to reimbursement of the money paid by him. *Id.*
4. There was evidence tending to show that the husband and wife had not fully resumed their conjugal relations. *Held*, immaterial; that their reconciliation was apparently complete and defendants

had the right to assume it was wholly so. *Id.*

5. Where an action by a wife for a judicial separation from her husband on the ground of abandonment is determined in her favor, the court has power, as part of the final judgment, to make an allowance for the repayment of sums expended by plaintiff in her support and maintenance since the commencement of the action. *Percival v. Percival.* 637
6. The General Term has power to review the judgment in this respect, and to strike out the allowance as improvidently made. *Id.*
7. *It seems*, a General Term order striking out the allowance on the ground that the court below had no power to grant it, is error. *Id.*
8. It must appear, however, from the order that the action of the General Term in striking out the allowance was based on the ground of want of power in the court below to authorize this court to review it; the opinion may not be resorted to to determine the grounds of the decision. *Id.*

INFANTS.

1. The question at what age an infant's responsibility for negligence may be presumed to commence, is not one of fact, but of law. *Tucker v. N. Y. C. & H. R. R. Co.* 308
2. In the absence of evidence tending to show that a boy twelve years of age was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track an adult would, he must be deemed *sui juris* and chargeable with the same measure of caution as an adult. *Id.*
3. Plaintiff, an infant about seventeen months old, escaped from his mother's house near a railroad crossing by crawling under a gate which was fastened, went upon

the track, was struck by a train and injured. In an action to recover damages for the injury, it appeared that the bell on the locomotive was not rung or the whistle sounded eighty rods from the crossing as required by the statute. There was no evidence authorizing a finding that had the statute relating to signals at railroad crossings been complied with, the mother's attention would have been called in time to have enabled her to rescue the child, or that the injury might otherwise have been prevented. *Held*, that the testimony did not authorize a recovery. *Chrystal v. T. & B. R. R. Co.* 519

INSOLVENCY.

1. Where one engaged in commerce permits his commercial paper to be dishonored and his property to be attached in an action in which judgment is subsequently recovered by default, this is evidence, and if unexplained is proof of insolvency. *Tinhill v. Skidmore.* 148
2. When the price of goods sold on credit is due and unpaid, and the vendee becomes insolvent before obtaining possession, the vendor has the right to retain possession of the property as security for the purchase-price, as against the vendee or his attaching creditor, which right is greater than a lien. *Id.*

INTEREST.

1. The letters of an executor were revoked because of misappropriation of the funds of the estate by him. By the surrogate's decree upon the final settlement of his accounts he was directed to pay a sum exceeding the penalty of his bond. The surety was charged with interest upon the penalty from the time of the misappropriation. *Held*, error; but that he was chargeable with interest from the date of the decree. *Hood v. Hayward.* 1
2. The provisions of the Revised Statutes (2 R. S. 90, § 43) direct-

ing that "no legacies shall be paid until after the expiration of one year from the time of granting letters testamentary or of administration unless the same are directed by the will to be sooner paid," changed the time when legacies commence to draw interest from one year after the death of the testator to one year after the granting of letters. *In re McGowan.* 526

3. The words "letters testamentary" or "of administration" include temporary letters, and so, where such letters have been granted, pending proceedings for the probate of a will, interest upon a legacy begins to run one year after the date of the issue of such letters. *Id.*

JOINT DEBTORS.

Where a release of one of two joint debtors contains an express provision that it shall not affect or impair the claim of the creditor against the other debtor, the latter is not discharged. *Whitlemore v. Judd L. & S. Oil Co.* 565

JOINT LIABILITY.

Persons who, by their several acts or omissions, maintain a public or common nuisance, are jointly and severally liable for such damages as are the direct, immediate and probable consequences of it. *Simmons v. Emerson.* 319

JUDGMENT.

1. Plaintiff's complaint alleged, in substance, that defendant had taken down a line fence between the lands of the parties, and erected a new fence upon plaintiff's land, also that he had raised a dam on his land to a greater height than he was entitled to, thereby causing the water to overflow upon and injure plaintiff's lands. The relief asked for was that the defendant be required to return the fence to the proper line, to lower his dam, and for damages. The trial court

found as a fact that the fence built by defendant was not upon plaintiff's land, but upon the line between his and defendant's land and marks the same; it found in favor of plaintiff as to the dam, and as a conclusion of law that the dam should be lowered as specified. The court refused to find, as a conclusion of law, as requested by defendant, that the latter was entitled to a judgment declaring that the fence in question "is not upon plaintiff's land, but upon the line between plaintiff's and defendant's lands." The judgment recited none of the facts found, except such as were favorable to plaintiff, and it contained no adjudication upon the issue relating to the division fence. *Held*, error; that the issue as to the fence was a material one, and defendant was entitled to the fruit of the finding of facts in his favor by having such an adjudication made as would, by matter of record, estop the plaintiff from reopening the controversy; and that as the complaint could not be dismissed upon the merits, plaintiff having succeeded in part, defendant's only protection was an express direction for judgment in his favor, to the extent required by the facts found. *Outwater v. Moore*. 66

was no finding that said recommendation had been adopted, or that the common council were about to adopt it, or had fraudulently or wrongfully directed payments to McC., or that the other city officials, without whose acts, under the city charter (§ 80, tit. 2, chap. 519, Laws of 1870), money could not be drawn from the treasury, were threatening to do any wrong or improper act, or that McC. held any orders or warrants that have not been paid. A judgment was rendered, declaring the assessments void, restraining their collection, and enjoined the city and its officers from drawing any order or warrant, or directing any to be drawn, on said fund to McC. or his order until the work was completed as required. The General Term reversed the judgment as to the assessments, but affirmed the residue thereof. *Held*, it must be assumed that the assessments and the contract with McC. were valid; that in the absence of a finding that the duty imposed upon the common council by the charter as to McC.'s contract was not properly and rightfully performed, the court could not interfere, and, therefore, that the affirmance was error. *Un. Cemetery Assn v. O'Connell*. 88

2. In an action brought by property owners in the city of Buffalo to determine the legality of certain assessments upon their premises to pay the expense of macadamizing a street, to enjoin the city from enforcing the collection thereof, and to restrain payment of any money to the defendant McC., who was the contractor for the work, out of the fund created by the assessment, it appeared that the contract with McC. provided that payments should be made to him semi-monthly, as the work progressed, at the discretion of the common council, upon estimates of the engineer of the amount of work actually performed. The only finding as to any wrong doing by any city officer was that the city engineer, knowing that McC. had not performed the work in accordance with the specifications, had recommended the common council to pay McC. out of said fund. There

3. Defendant, the J. L. & S. Oil Co., brought an action upon an alleged joint claim against T. & H. T. alone defended, denying any liability on his part. The action was determined in favor of the plaintiff therein; one roll was filed, but separate judgments were entered against the defendants for different amounts, the one against T. being the greater by the amount of the costs and interest. In an action to restrain the collection of the judgment against H., *held*, that the judgments could not be considered as joint; and that a release of T. did not, in the absence of any claim of payment by either debtor, affect the right of the judgment creditors as against H. *Whittemore v. Judd L. & S. Oil Co.* 565
4. Also *held*, that the judgment against T. could be separately assigned without affecting the rights of the creditor as against H. *Id.*

JURISDICTION.

1. Where, by an agreement between the parties, a patentee grants to a licensee the right to make and sell his inventions, and the licensee acknowledges the validity of the patent and stipulates to pay royalties, an action to recover the royalties does not arise under any act of congress in relation to patents, and is within the jurisdiction of the state courts. *Hyatt v. Ingalls*.

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2. A patent for an improvement in illuminated basements and basement extensions, sidewalks, roofs, etc., was issued to plaintiff in 1867, and reissued in 1878. By an agreement made in November, 1878, plaintiff granted to defendants the exclusive right to manufacture and sell within certain territorial limits the illuminated tile work covered by the patent and its reissue. It was provided that the license should last during the continuance of the patent, or any extension or renewal thereof. The licensees recognized the validity of the patent, and expressly consented that it might be reissued by plaintiff as often as she should choose to do so. Defendants agreed to pay a specified royalty for tiles or plates used for the purposes specified in the patent. They manufactured and sold the patented articles, and up to August 1, 1881, paid royalties thereon. In September, 1881, plaintiff obtained a reissue of the patent, and thereafter defendants refused to pay royalties, although they continued to manufacture and sell. Plaintiff thereupon notified them that the license was forfeited. In an action to procure a cancellation of the agreement, an accounting and payment of royalties, and an injunction restraining defendants from selling or using the articles embraced in the patent, defendants set up as a defense that the reissued letters patent were void because they embraced other clauses than those covered by the previous letters, and omitted specifications and claims which were in the latter, and that the state court had no jurisdiction. *Held*, that the action did not arise under any law of

congress relating to patents, and was within the state jurisdiction.

Id.

3. In an action brought, among other things, to charge certain real estate with moneys alleged to have been wrongfully invested therein by the defendant, the complaint was dismissed; on appeal the General Term reversed the judgment and granted a new trial, but directed the complaint and notice of pendency to be amended by striking out all allegations concerning said real estate. No motion for an amendment had been made and the record did not disclose the existence of any of the causes prescribed for the cancellation of the notice, or that counsel on either side were heard upon the question. *Held*, that the General Term had no power to direct the notice of pendency to be so amended as to cancel and destroy it. *Beman v. Todd*.

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LEGACIES.

1. The provisions of the Revised Statutes (2 R. S. 90, § 43) directing that "no legacies shall be paid until after the expiration of one year from the time of granting letters testamentary or of administration unless the same are directed by the will to be sooner paid," changed the time when legacies commence to draw interest from one year after the death of the testator to one year after the granting of letters. *In re McGowan*.
2. The words "letters testamentary" or "of administration" include temporary letters, and so, where such letters have been granted, pending proceedings for the probate of a will, interest upon a legacy begins to run one year after the date of the issue of such letters.

Id.

LIEN.

To render a provision in a will effectual to furnish greater security than that given by law for the payment of debts in due course of administration, by charging them upon the real estate of the tes-

tator, the purpose must quite clearly appear; a mere direction to pay debts out of the property will not suffice. *In re Powers*. 361

LIMITATION OF ACTIONS.

1. The year within which, under the provisions of the General Manufacturing Act (§ 24, chap. 40, Laws of 1848), an action must be begun for the recovery of a debt owing by a corporation organized under it, so as to lay a foundation for a recovery against a stockholder under the provision (§ 10) making stockholders liable for the debts of the corporation until the whole capital stock has been paid in and a certificate as prescribed filed, begins to run on the day when the debt first became due. *Hardman v. Sage*. 25
2. If, therefore, the time of the payment of a debt is extended by the taking of a promissory note, which is sued within a year from the date of its maturity, but more than a year after the debt became due, the claim of the creditor against the stockholders is lost, and they cannot be charged with the payment of the debt. *Id.*
3. In an action under the statute (1 R. S. 749, § 4) to enforce the liability of heirs to pay a mortgage executed by their ancestor, it appeared that interest had been paid by the latter upon his bond accompanying the mortgage within twenty years prior to the commencement of the action. *Held*, that although the remedy was given by statute, the cause of action was founded upon the obligation of defendants' ancestor; and so, it was not barred by the Statute of Limitations. *Hauselt v. Patterson*. 349
4. Under the act of 1837, concerning executors and administrators (§ 37, chap. 460, Laws of 1837), as amended in 1868 (Chap. 594, Laws of 1868), and under the Code of Civil Procedure, the running of the Statute of Limitations against a debt due an executor or administrator from, or any cause of action in his favor against, the de-

cedent, is suspended from the time of the death of the latter until the first judicial settlement of the accounts of the executor or administrator; and this, without regard to the number of years embraced in that period. *In re Powers*. 361

5. Where, therefore, fourteen years elapsed between the death of the decedent and the first judicial settlement of an executor's accounts, *held*, that debts due him from decedent, which were not barred by the statute at the time of the death of the latter, were properly allowed the executor. *Id.*
6. S., defendant's testator, agreed with W., his nephew, plaintiff's assignor, that if he would refrain from drinking liquor, using tobacco, swearing and playing cards or billiards for money until he should become twenty-one years of age, he would pay him \$5,000. W. performed his part of the agreement; he became of age in 1875. Soon thereafter he wrote to S. advising him of such performance, stating that the sum specified was due him, and asking payment. S. replied admitting the agreement and the performance and stating that he had the money in bank, set apart, which he proposed to hold for W. until the latter was capable of taking care of it. It was thereupon agreed between the parties that the money should remain in the hands of S. on interest. S. died in 1887 without having paid any portion of the sum agreed upon. *Held*, that under the agreement made in 1875, the relation of the parties thereafter was not that of debtor and creditor, but of trustee and *cestui que trust*; and that, therefore, the claim was not barred by the Statute of Limitations. *Hammer v. Sidway*. 538

LIS PENDENS.

See NOTICE OF SUIT PENDING.

MANUFACTURING CORPORATIONS.

1. The year within which, under the provisions of the General Manu-

facturing Act (§ 24, chap. 40, Laws of 1848), an action must be begun for the recovery of a debt owing by a corporation organized under it, so as to lay a foundation for a recovery against a stockholder under the provision (§ 10) making stockholders liable for the debts of the corporation until the whole capital stock has been paid in and a certificate as prescribed filed, begins to run on the day when the debt first became due. *Hardman v. Sage*. 25

2. If, therefore, the time of the payment of a debt is extended by the taking of a promissory note, which is sued within a year from the date of its maturity, but more than a year after the debt became due, the claim of the creditor against the stockholders is lost and they cannot be charged with the payment of the debt. *Id.*

3. Under the provision of said act (§ 11), which requires a certificate to be made within thirty days after the payment of the last installment of the capital stock, stating the amount of the capital as fixed and paid in, "which certificate shall be signed and sworn to by the president and a majority of the trustees," in order to release the stockholders from liability, the certificate must be sworn to; an acknowledgment, without verification, is not sufficient. *Id.*

4. To establish a cause of action under the provision of the General Manufacturing Act (§ 10, chap. 40, Laws of 1848), making the stockholders of a company organized under it individually liable to the creditors of the company, to the amount of their stock, for all its debts, until the whole amount of the capital stock has been paid in, all that is required is to show that a valid debt was contracted before the capital stock was paid in, either in cash or in property honestly regarded as a fair equivalent to cash. *Nat. Tube Works Co. v. Gilfillan*. 302

5. The liability covers "all debts and contracts made by said company," irrespective of the circumstances under which they were

made. There is no exemption from liability, because credit was imprudently given by the creditor, or because he gave credit upon the supposition that the property of the corporation was sufficient to pay its debts. *Id.*

6. By proof that the stock of the company has been issued as full-paid stock which has not been fully paid, a legal fraud is established; it is not necessary to show otherwise an actual fraudulent intent. *Id.*

7. So, also, if it be shown that the stock was issued in payment for property, with knowledge on the part of its trustees that the value of the property was much less than the amount of the stock, no other fraudulent intent than that which is evidenced by the action of the trustees need be shown to authorize a recovery. *Id.*

MARRIAGE.

1. In an action to recover back money paid by plaintiff to defendant, who carried on a business known as "a matrimonial bureau," on an agreement by him to procure a husband for her; he to return the money paid on a day named, if at that time she was willing to give up all acquaintance with gentlemen introduced to her by defendant, there was no evidence of actual over-persuasion or undue influence. The court held, as a legal conclusion, that the contract was illegal, and that the parties to it were equal in guilt, and directed a verdict for defendant. *Held*, error; that while the contract was illegal, at most the inferences to be drawn from the facts as to the equality of guilt were for the jury. *Dural v. Willman*. 156

2. *It seems* that the business of promoting marriages is against the policy of the law and public interest, and the courts will aid a party who has patronized such a business by relieving him or her from all contracts made, and will grant restitution of any money paid or property transferred. *Id.*

3. *It seems* also that contracts by one party to procure, for a consideration, a husband or wife for the other, are considered as fraudulent in their character, and the party paying the consideration will be regarded as under a species of imposition or undue influence. *id*
4. Where a marriage has been annulled by judicial decree, upon the ground that when it was contracted the husband had a former wife living, who had absented herself for more than five successive years immediately preceding the second marriage, without being known by him to be living, although until it was so annulled it was voidable only and not void (2 R. S. 139, § 6), and the cohabitation of the parties was not adulterous, and although both parties entered into the marriage in entire good faith, yet the wife is not entitled to dower in the real estate owned by the husband at the date of the decree. *Price v. Price*. 589

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. A person entering into a contract of service with one employer may not, without his knowledge or assent, be made to assume the hazards of a service conducted by another and in which he is not engaged, and so be personally subjected to the consequences of the negligence of the latter, without remedy against him. *Brewer v. N. Y., L. E. & W. R. R. Co.* 59
2. Plaintiff, who had been for a number of years a traveling salesman over a certain route, and who had been in defendant's employ under an oral agreement to sell its goods on commission, he to have the exclusive right to sell over that route without interference by the company or its salesmen, entered into a written agreement with it by which he agreed to travel over said route, which was termed in the contract "his route," at least six times a year, representing and sell-

ing defendant's goods and selling no other goods to conflict with them; defendant agreed to pay him for his services a commission on all orders accepted from *bona fide* purchasers, the commission on new trade to be double that allowed on the regular trade. Plaintiff entered upon his duties under the agreement and continued to discharge them until the agreement was terminated. In an action to recover commissions unpaid, it appeared that some of the orders accepted by the defendant came directly to it from the persons making them and some were taken by other employes of the company, also that orders were received from responsible parties which were not accepted by defendant. The referee allowed plaintiff commissions on all accepted orders made by parties on the line of his route with certain exceptions specified in the contract, and also upon such unaccepted orders. *Id.*, no error, that the commissions were not limited to orders obtained and received by plaintiff; and that defendant had no right arbitrarily and without cause to reject orders from *bona fide* purchasers. *Taylor v. Morgan's Sons Co.* 184

3. While an employe, by entering into the employment, assumes and assents to the ordinary risks incident thereto, this does not release the employer from the duty to take reasonable precautions to insure the servant's safety while in the discharge of his duties, and when the latter is injured because of failure to perform this duty, the master is liable. *Ford v. L. S. & M. S. R. Co.* 498
4. The law will not assume that a servant has been derelict in duty simply from the fact that his employer has discharged him before the expiration of the term of employment, and in an action by him for a breach of the contract of employment, upon proof that he was discharged while engaged in the performance of the contract, and before his term of service had expired, the burden is cast upon the employer of proving, and hence of alleging, facts in justification of the dismissal. (Code Civ. Pro.

§ 500.) *Linton v U. Fireworks Co.* 536

5. In such an action the complaint set up the contract of employment and alleged that plaintiff entered defendant's employ under it; that before its termination defendant, without right or cause, discharged him. The answer admitted the contract, denied the breach, alleged that plaintiff was discharged for cause, and separately specified twelve acts of plaintiff in alleged violation of the contract. Both parties gave evidence tending to sustain the allegations in their respective pleadings, and in addition thereto defendant offered to show other acts of misconduct and unfaithful service on the part of plaintiff not alleged in its answer. This was, upon objection, excluded. *Held*, no error. *Id.*

6. In an action to recover damages for the alleged negligent killing of R., plaintiff's intestate, it appeared that he was in defendant's employ, engaged in tiering up freight in the hold of one of its vessels and received the injuries which caused his death, while coming up from the hold on an elevator used in the work, by being caught between the elevator and the combing of the hatch. There was room enough upon the elevator for him to stand without being exposed to danger, and there was no evidence from which it could be inferred that he used the precautions of a prudent man. At the request of the plaintiff's counsel the court charged that "if the deceased was rightfully on the elevator at the time of his injury, in the absence of the testimony of an eye witness of the accident, the jury may assume that he received his injury in the performance of his duty and had not omitted the precautions which a prudent man would take in the presence of known danger." *Held*, error. *Riordan v. Ocean S. S. Co.* 655

MORTGAGE.

1. *It seems* that while a mortgage creditor has the right to seek payment of his debt from the personal estate of the deceased mortgagor,

a court of equity will not permit him to do so in the first instance to the prejudice of other creditors, but he will be required to resort to the land covered by the mortgage, and will only be permitted to seek payment of the deficiency from the personalty. *Hauselt v. Patterson.* 349

2. The provision of the Revised Statutes (1 R. S. 749, § 4) requiring a devisee or heir to satisfy, out of his own property, a mortgage executed by his testator or ancestor upon real estate which has passed or descended to him, unless there is an express testamentary direction that such mortgage shall be otherwise paid, does not contemplate that the devisee or heir should be so liable irrespective of the property which descended to him, but rather that his liability to pay the mortgage should be measured by and not exceed the value of that property. *Id.*
3. The remedy of the mortgage creditor is not confined to the mortgaged premises; it was designed to make the realty primarily chargeable with the mortgage debt, and when, with the mortgaged premises, the heir inherited other lands of the same ancestor, that he should take them all *cum onere* the mortgage debt. *Id.*
4. It was not intended, however, to give such creditor a preference over other creditors in respect to the real estate not covered by the mortgage when there is a deficiency of the personalty to pay the other debts. The only substantial advantage the mortgage creditor has over other creditors in respect to the lands not covered by the mortgage is that his right of action is not dependent upon a sufficiency of personal assets. *Id.*
5. The preference of the mortgage creditor in the mortgaged premises is only available to him by foreclosure. *Id.*
6. In an action under the statute to enforce the liability of the heirs or devisees they may allege in their answer and prove other debts of the decedent unsatisfied belonging

- to the same or prior class as that in suit, and properly chargeable against the land by reason of a deficiency of personality. (2 R. S. 453, §§ 39, 40; Code, § 1856.) *Id.*
7. The amount of the recovery in such an action must be in proportion to the value of the real estate which has descended to the defendants respectively; it is only when they have transferred the land that they are personally liable, and then only for an amount not exceeding its value. *Id.*
 8. When the land has not been aliened by the heirs or devisees the remedy is by action in equity having the nature of a proceeding *in rem* to reach the land. (2 R. S. 454, § 47; Code Civ. Pro. § 1852.) *Id.*
 9. The liability of the defendants is not joint, nor is the estate which has descended to any one of them subject to the proportion of the mortgage debt chargeable to any of the others. *Id.*
 10. In an action against all the heirs or their representatives, except one, of McC., who died intestate as to his real estate, to recover a deficiency arising on foreclosure of a mortgage upon land of which he died seized, it appeared that one-sixth of the real estate descended to the heir not a party, and that such interest was not represented by any defendant. A joint judgment against the defendants for the amount of the deficiency was rendered, neither the amount of the recovery nor the costs being apportioned; the judgment did not direct that its amount be levied upon the land which descended to the heirs. *Held*, error; that the defendants were chargeable only with five-sixths of plaintiff's claim, and for that amount only their interest in the real estate was subject to the levy of execution on the judgment; that the omission to plead the defect of parties defendant was a waiver merely of that defense, and did not increase the defendants' liability. Judgment, therefore, modified so as to charge the defendants with five-sixths of the amount of the recovery, and to direct the levy of it, duly apportioned upon the real estate which descended to defendants. *Id.*
 11. Interest had been paid by McC. upon his bond accompanying the mortgage within twenty years prior to the commencement of the action. *Held*, that although the remedy was given by statute, the cause of action was founded upon the obligation of defendants' ancestor; and so, it was not barred by the Statute of Limitations. *Id.*
 12. Defendant S. was sued as surviving trustee under the will of J., one of the heirs, who died in the state of New Jersey; her will was admitted to probate in that state; it was recorded in the office of the surrogate of New York city and county, but not formally admitted to probate in this state. By said will J. devised to S. and G., as trustees, her real estate in this state in trust, giving the survivor power to execute the trust. *Held*, that in respect to the land, the trustee was subject to the equitable jurisdiction of the courts of this state; and so, was properly made a party; and that a refusal to dismiss the complaint as to him was not error. *Id.*

See FORECLOSURE.

MOTIONS AND ORDERS.

1. In an action for divorce, an order of reference was entered by consent of the court on stipulation of the parties. After one hearing before the referee, plaintiff moved to vacate the order, and to have the issue sent to a jury; this motion was denied. *Held*, that as plaintiff had waived her right of trial by jury, the motion was not a demand of a right, but a petition for a favor; and so, it presented a matter in the discretion of the court, the exercise of which was not reviewable here. *Winans v. Winans*. 140
2. The plaintiff afterwards moved for leave to discontinue the action without payment of costs or allowance, or on such terms as the court

might decree. The alleged contract of marriage was denied by defendant; it was not claimed by plaintiff that any marriage ceremony was ever performed, and, according to her evidence, the contract rested in parol, and was made when no witnesses were present. It appeared that some years before the commencement of this action and on the eve of defendant's marriage to another, plaintiff sought and succeeded in obtaining redress for an alleged injury not consistent with a claim of marriage; that defendant married and lived with another woman in the open relation of husband and wife for several years until her death; he thereafter married another woman, who was designated in the complaint as co-respondent, by whom he had, prior to the commencement of this action, one child. The motion was denied. *Held*, that the matter was within the discretion of the court, and so, not reviewable here. *Id.*

MUNICIPAL CORPORATIONS.

1. *It seems*, where the charter of a municipality provides that it shall be presumed that every assessment made is "valid and regular, and that all the steps and proceedings required by law were taken and had until the contrary shall be made to appear," this presumption entitles a person whose land is assessed to relief, when the illegality of the assessment is shown and it rests in something *de hors* the record. *Pooley v. City of Buffalo*. 206

2. In an action to recover damages for injuries alleged to have been caused by defendant's neglect to keep one of its streets in repair, it appeared that the street in question was regularly laid out, and up to the intersection with another street, was opened and worked; but that the portion where the accident happened was not worked and never had been used as a highway, and for more than six years had been closed by a fence across it, and there was no access thereto except from private property; also, that it had been rendered impass-

able for public travel by deep excavations therein, and that sand and clay were excavated therefrom and carried away by private parties, without hindrance from the town officials or the public. Plaintiff entered thereon from private property. *Held*, that the *locus in quo* was not a highway; and so, that plaintiff was not entitled to recover. *Horey v. Village of Haverstraw*. 273

3. The legislative power is ample to provide for a municipal improvement, and for that purpose to designate the district deemed benefited by it within the municipality, charge the expense of it upon the property in such district and direct assessments to be made therefor. *McLaughlin v. Miller*. 510

4. Where, however, the duty of distribution of such expense by assessment upon the several properties within the designated district is by the statute devolved upon any board or officer, some provision for notice to the property owners is essential; as without an opportunity to be heard they would be deprived of their property without due process of law. *Id.*

5. Municipal corporations, engaged in the performance of works of a public nature authorized by law, are not liable for consequential damages occasioned thereby to others, where private property is not directly encroached upon, unless such damages are caused by misconduct, negligence or unskillfulness. *Atrater v. Trustees, etc.* 602

6. Where, therefore, defendant, while engaged in building a bridge, in pursuance of statutory authority, erected a coffer-dam in the outlet of a lake, which was necessary for the work, which obstructed the flow of the water from the lake and caused it to remain on plaintiff's land, and substantially deprived him of its beneficial use for one season, *held*, it appearing that the work was properly and expeditiously done, that defendant was not liable for the damages; that there was not

a taking of plaintiff's property within the meaning of the constitutional provision prohibiting such taking without compensation. *Id.*

7. Also *held*, that the time and the necessity for the construction were matters to be determined by defendant, and in the absence of proof of bad faith, the exercise of this discretion was not the subject for review. *Id.*

See BUFFALO (CITY OF).
BROOKLYN (CITY OF).
NEW YORK (CITY OF).

NEGLIGENCE.

1. *It seems* that a railroad corporation does not undertake to carry and safely deliver the effects of travelers not delivered into its custody, and while money, necessary for the expense of a journey undertaken, which is carried in the trunk of a passenger, is part of his baggage, and if lost while in the custody of the corporation for transportation, it is liable, money in the clothing worn by the passenger is not in its custody, and it is not chargeable for its loss, unless negligence on its part is shown. *Carpenter v. N. Y., N. H. & H. R. R. Co.* 53

2. A railroad corporation which runs sleeping-coaches on its road, with sections separated from the aisle only by curtains, is bound to have an employe charged with the duty of carefully and continually watching the interior of each car while berths are occupied by passengers. *Id.*

3. *It seems* the mere proof of the loss of money by a passenger while occupying a berth in such car, does not make out a *prima facie* case against the corporation; some further evidence tending to show negligence on its part must be given. *Id.*

4. A person entering into a contract of service with one employer may not, without his knowledge or assent, be made to assume the hazards of a service conducted by another

and in which he is not engaged, and so be personally subjected to the consequences of the negligence of the latter, without remedy against him. *Brewer v. N. Y., L. E. & W. R. R. Co.* 59

5. In an action brought to recover damages for the death of B., plaintiff's intestate, who was killed while traveling in an express car in one of defendant's trains, by an accident, caused by defendant's negligence, it appeared that B., at the time of his death, was in the employ of the U. S. Express Company, as messenger; that said company had entered into a contract with a railway company, to the rights and duties of which the defendant had succeeded, by which said railway company agreed to transport the messengers of the express company and certain specified property free of charge; the latter assuming all transportation risks and other liabilities arising in respect thereof, and agreeing to indemnify and protect the former therefrom. The responsibility of the railway company in transporting express freight was limited to cases of negligence, it, "in no event, whether of negligence or otherwise," to be responsible for property "carried by the railway company free of charge." There was no evidence that B. had any knowledge or information of the provisions of the contract. *Held*, that defendant was liable; that B. was a passenger and could not, without his knowledge or consent, be chargeable with the stipulations in the contract; and that while, when he entered into the service of the express company he assumed the ordinary hazards incident to that business, there was no presumption or implied understanding that he took upon himself the risks of injury which he might suffer through defendant's negligence. *Id.*

6. When a telegraph company receives without conditions, a message for transmission, among the other obligations implied is the duty on its part to exercise due diligence to accurately transmit and promptly deliver the message;

it does not insure accurate transmission and prompt delivery, but undertakes to exercise due diligence in these respects. *Pearson v. W. U. Tel. Co.* 256

7. In an action against a telegraph company for damages for failing to accurately or promptly deliver a message, the plaintiff makes out a *prima facie* case of negligence by proving the delivery to it of the message, and that it was inaccurately or not promptly delivered. *Id.*
8. A telegraph company incorporated under the General Telegraph Act (Chap. 265, Laws of 1848, as amended) of this state may, by contract, limit its liability for mistakes or delays in the transmission or delivery or for non-delivery of messages, caused by the negligence of its servants if the negligence be not gross, to the amount received for sending the dispatch; but such a company cannot, by notice, limit its liability in this respect, unless it is brought to the personal knowledge of the sender of the message and he assents to it. (BRADLEY and BROWN, JJ., dissenting.) *Id.*
9. Plaintiff, who was a member of a firm of stockbrokers doing business in the city of New York, while absent from the city, delivered a telegram to defendant, directed to his firm, written upon a sheet of blank paper, directing the purchase of certain shares of stock. Through the mistake of the operator, the message as sent, was directed to plaintiff individually, and in consequence it remained unopened until his return the next day after its receipt, when the purchase was made; the stock, however, had meanwhile risen in the market. *Held*, that defendant was chargeable with negligence; and that plaintiff was entitled to recover, as damages, the difference between the market value of the stock at the time of the receipt of the message and the sum paid for it. *Id.*
10. In an action to recover damages for injuries alleged to have been caused by defendant's neglect to keep one of its streets in repair, it appeared that the street in question was regularly laid out, and up to the intersection with another street, was opened and worked; but that the portion where the accident happened was not worked and never had been used as a highway, and for more than six years had been closed by a fence across it, and there was no access thereto except from private property; also, that it had been rendered impassable for public travel by deep excavations therein, and that sand and clay were excavated therefrom and carried away by private parties, without hindrance from the town officials or the public. Plaintiff entered thereon from private property. *Held*, that the *locus in quo* was not a highway; and so, that plaintiff was not entitled to recover. *Horey v. Village of Haverstraw.* 273
11. The law requires a traveler on a highway, before crossing a railroad track to look and listen for the approach of trains, and if he omits to do so and suffers injury, he cannot maintain an action against the railroad company, although it was guilty of negligence. *Tucker v. N. Y. C. & H. R. R. Co.* 308
12. In an action to recover damages for injuries so sustained, the plaintiff must show that he did his duty in this respect, or prove facts from which the inference can reasonably be drawn that he did. *Id.*
13. The question at what age an infant's responsibility for negligence may be presumed to commence, is not one of fact, but one of law. *Id.*
14. In the absence of evidence tending to show that a boy twelve years of age was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track an adult would, he must be deemed *sui juris* and chargeable with the same measure of caution as an adult. *Id.*
15. In an action to recover damages for alleged negligence causing the

death of T., plaintiff's intestate, the following facts appeared: T. was a boy twelve years old, intelligent, accustomed to attend school and assist the family by his labor; he lived near defendant's road; he was killed by one of defendant's locomotives when attempting to cross its tracks; the day was windy and it was snowing, but not enough to obstruct the view; the street upon which he was traveling was crossed by four of defendant's tracks; the first was a switch track upon which cars were standing on each side of the street, a passageway having been left open for teams and individuals to pass along the street. T. stopped in the centre of the switch track facing in the direction of the locomotive which was backing down at a high rate of speed; if he had looked he could have seen 186 feet down the track; from the point where he stood to the center of the track where he was struck and killed, the distance was fourteen feet. T., after changing a bag he was carrying from one shoulder to another, started on; after taking one step he had an unobstructed view down the track on which the locomotive was coming, for two streets; he did not look in that direction after he started. *Held*, that T. was *vi juris* and was guilty of contributory negligence; and that the submission of the question to the jury was error. *Id.*

16. In an action to recover damages for alleged negligence causing the death of S., plaintiffs' intestate, these facts appeared: The defendants E., P. and L., were owners of three adjoining lots on a city street, upon which there were three brick stores, separated by partition walls, extending from the foundations to the roofs; the fronts of said stores were a continuous brick wall of a uniform thickness, which was interlocked with the partition walls. These stores were burned, leaving the front wall and a part of the partition walls standing. The front wall shortly after began to lean toward the street and continued to do so more and more, until it gave way near the partition wall which separated the

buildings of L. and P., carrying down the entire front. Material from the part of the front wall standing on the lots of E. and P., and from their partition wall, fell upon S., who was lawfully on the sidewalk, near the boundary between their lots, and killed him. No part of L.'s wall touched him. *Held*, that the evidence justified findings that the walls left standing became immediately after the fire unsafe, dangerous and liable to fall into the street, and so were a public nuisance; that each of the defendants E., P. and L. was negligent in not removing or supporting the walls on his lot; that the several neglects united and directly caused the walls to fall; and so, that they were jointly liable. *Simmons v. Ererson.* 319

17. In an action to recover damages for alleged negligence causing the death of O., plaintiffs' intestate, it appeared that O. was going south upon the west sidewalk of a city street running north and south, which is crossed by the three tracks of defendant's railroad; the space between the middle and the south track is seven feet. At the crossing there were safety-gates, which were down as O. approached. When they began to rise he went on; he could see nothing south or west as he approached the middle track, his view being obstructed by cars standing thereon, one of which reached half across the sidewalk and projected two feet beyond the rails. O. passed out from behind this car into the space between the middle and south track and was struck by the cross-beam of the tender to a locomotive on the latter, which was backing from the west; the cross-beam projected two feet beyond the track, thus leaving a space of but three feet between it and the car. O. had no knowledge of the locality; he was walking fast with his head down, the sidewalk being rough; he did not look toward the west as he passed beyond the car; the bell on the locomotive was not rung; the gateman had begun to lower the south gate, which was half-way down when the accident happened; he shouted to O. who paid no attention. *Held*, that the

question of contributory negligence was properly submitted to the jury; that it could not be held, as matter of law, that O., hearing no bell and conscious of no danger, was bound to look to the west the instant he passed beyond the car; that while bound to use his eyes he was not bound to use them in a particular manner or at a particular instant of time; also that it was a question for the jury as to whether he heard the call of the gateman. *Oldenburg v. N. Y. C. & H. R. R. Co.* 414

18. While want of contributory negligence, on the part of a person killed at a railroad crossing, may be established by inferences drawn from the circumstances, such an inference may not be drawn simply from a presumption that a person exposed to danger will exercise care and prudence in regard to his own safety. *Witworski v. L. S. & M. S. R. Co.* 420

19. In an action to recover damages for alleged negligence causing death, freedom of contributory negligence must be proved, and where the circumstances point as much to the negligence of the deceased as to its absence, or point in neither direction, a refusal to nonsuit is error. *Id.*

20. The fact that another person who was in company with the deceased looked and listened, but did not hear or see the approaching train, does not establish that he would have failed also had he looked and listened. *Id.*

21. In an action to recover damages for alleged negligence, causing the death of W., plaintiff's intestate, it appeared that W., while passing along a city street, in attempting to cross one of defendant's tracks, was struck and killed by the tender of a locomotive which was backing down on the track drawing a caboose. It was dark at the time, but quiet, and lights were burning in the cupola of the caboose; W. had crossed over three tracks before reaching the one where the accident occurred; some cars were standing on the

first track which came within about twenty feet of the street. This track is about fifty feet distant from that on which W. was killed; the latter is straight for a long distance each way from the street. No evidence was given tending to show that W. looked or listened before reaching defendant's tracks; plaintiff, his wife, who was following closely behind him, testified that she looked and listened when she first approached the tracks, but saw no light or car approaching. *Held*, that the evidence failed to show want of contributory negligence; and that a refusal to nonsuit the plaintiff was error. *Id.*

22. Defendant was one of six executors of a will; letters testamentary were issued to all; two of them C. & B., took charge and possession of the estate and assumed to administer it. No portion of the assets came into defendant's hands, except what she received as the share of the residuary estate given her by the will, and she took no active part in the management. The will directed that the share of D., one of the beneficiaries and also one of the executors, should be invested by the executors upon bond and mortgage, the income applied during his life to the support of his family, and on his decease the share to go to plaintiffs, his children. C. & B. divided the estate into shares as directed, and paid over to the beneficiaries, except D., their shares. At that time all of the beneficiaries were present. The property apportioned and set apart, as the share of D. was examined by him and handed over to B. to care for. It was not invested as directed by the will, but was misappropriated by C. & B. who were copartners. About eight years after the issuing of letters testamentary they failed. It did not appear that up to the time of the failure there was anything to excite suspicion that they were not prudent and reliable business men. In an action brought by plaintiffs to recover said share, *held*, that the fact did not justify a finding of such negligence, on the part of the defendant, as to render her liable. *Cocks v. Haviland.* 426

23. The will directed an investment for the testator's widow. The investment was not made by C. & B. as directed, but in another security. Defendant remonstrated against this at the time, but took no action to compel a proper investment; no loss resulted therefrom. Four years before the failure of C. & B. defendant knew that they had not made any other investment of the fund, and she then joined in an undertaking to the widow that her annuity should be paid. *Held*, that these facts were not sufficient to charge defendant with want of due care and caution. *Id.*

24. In an action to recover damages for the alleged negligent killing of F., plaintiff's intestate, who was a switchman in defendant's employ, it appeared that he was killed while at his post of duty by being struck by heavy timbers that fell from a passing open car which was improperly loaded. Defendant furnished good cars and stakes, but it had no rule, method or system in reference to the loading of lumber or timber; the manner of loading being left to the discretion of its employes. It had adopted a general rule requiring its employes "to attend to the loading of all freight, whether loaded by station men or by shippers, to see that it is safely stored, and so that it cannot fall off the cars." Plaintiff proved that on other roads a verbal rule existed requiring that in all cases, no matter how short the distance, lumber, whenever loaded above the sides of a car, should be secured by stakes on the sides and stays over the top. *Held*, that the evidence justified the submission to the jury of the question as to whether defendant had made a proper and sufficient rule with respect to the loading of cars with lumber; and that a finding in the negative was sufficient to sustain a verdict against it. *Ford v. L. S. & M. S. R. Co.* 493

25. To charge a railroad corporation in an action for negligence, it is not sufficient to prove a negligent act on its part; it must be made to appear that the injury complained of was sustained by reason of such

act. *Chrystal v. T. & B. R. R. Co.* 519

26. Plaintiff, an infant about seventeen months old, escaped from his mother's house near a railroad crossing by crawling under a gate which was fastened, went upon the track, was struck by a train and injured. In an action to recover damages for the injury, it appeared that the bell on the locomotive was not rung or the whistle sounded eighty rods from the crossing as required by the statute. There was no evidence authorizing a finding that had the statute relating to signals at railroad crossings been complied with, the mother's attention would have been called in time to have enabled her to rescue the child, or that the injury might otherwise have been prevented. *Held*, that the testimony did not authorize a recovery. *Id.*

27. In an action to recover damages for the alleged negligent killing of R., plaintiff's intestate, it appeared that he was in defendant's employ, engaged in tiering up freight in the hold of one of its vessels and received the injuries which caused his death, while coming up from the hold on an elevator used in the work, by being caught between the elevator and the combing of the hatch. There was room enough upon the elevator for him to stand without being exposed to danger, and there was no evidence from which it could be inferred that he used the precautions of a prudent man. At the request of the plaintiff's counsel the court charged that "if the deceased was rightfully on the elevator at the time of his injury, in the absence of the testimony of an eye witness of the accident, the jury may assume that he received his injury in the performance of his duty and had not omitted the precautions which a prudent man would take in the presence of known danger." *Held*, error. *Riordan v. Ocean S. S. Co.* 655

—When evidence of contributory negligence sufficient to require submission of question to jury.

See *Hogan v. C. P., N. & E. R. R. Co.* (Mem.) 647

NOTICE.

1. A shareholder in a corporation is not chargeable with constructive notice of resolutions adopted by the board of directors, or of provisions in the by-laws regulating the mode in which its business shall be transacted with its customers, and when dealing with the corporation as a customer his rights are not limited by its regulations or by-laws not brought to his knowledge. *Pearsall v. W. U. Tel. Co.* 256
2. One who has been a known and recognized partner in a firm, but who has withdrawn therefrom, can only relieve himself from liability for subsequent transactions between his former partner in the firm name and third persons, who are unaware of the change, by giving notice of his withdrawal. *Elmira I. & S. R. M. Co. v. Harris.* 280
3. A notice of dissolution published in a local newspaper, only affects those who previously had not dealt with the firm, but thereafter dealt with the remaining members; it does not operate as a notice to one with whom the firm had business relations prior to the publication; as to them, actual notice is necessary. *Id.*

NOTICE OF SUIT PENDING.

1. Where an action is one in which the right is given the plaintiff, by the Code of Civil Procedure (§ 1670), to file a notice of pendency, the right is absolute, not resting in the discretion of the court, and if the notice is properly filed, it may not be canceled save in the manner prescribed by the Code (§ 1674). *Beman v. Todd.* 114
2. In an action brought, among other things, to charge certain real estate with moneys alleged to have been wrongfully invested therein by the defendant, the complaint was dismissed; on appeal the General Term reversed the judgment and granted a new trial, but directed the complaint and notice of pendency to be amended

by striking out all allegations concerning said real estate. No motion for an amendment had been made and the record did not disclose the existence of any of the causes prescribed for the cancellation of the notice, or that counsel on either side were heard upon the question. *Held*, that the General Term had no power to direct the notice of pendency to be so amended as to cancel and destroy it. *Id.*

3. Where an action in which a *lis pendens* was filed has been dismissed and the notice canceled, it ceases to be a statutory notice to *bona fide* purchasers of the premises described in it. (Code Civ. Pro. §§ 1670, 1674.) *Valentine v. Austin.* 400
4. In an action to set aside a deed from B., plaintiff's ancestor, to defendant R., also a deed from R. to defendant A., and a mortgage from the latter to defendant L., it was found that R. obtained his deed by fraud and undue influence, but that A. purchased in good faith, relying on R.'s record title and possession. It appeared that a prior action was brought against R. to set aside a former deed of the premises from B. to him, on the same ground, in which action a notice of pendency was filed; a final judgment was entered therein dismissing the complaint, and said *lis pendens* was canceled by order of the court. It did not appear that A. knew of the former judgment. It was claimed that A. was chargeable with either statutory or implied notice of the infirmity of his title. *Held*, untenable; that the *lis pendens*, when canceled, ceased to be a statutory notice; and that the omission of A. or L. to search for the papers filed in that action was not negligence or evidence of bad faith on their part. *Id.*

NUISANCE.

1. A deed from defendant of a lot in the city of New York, after reciting that the grantor was the owner of an adjoining lot, contained a covenant on his part, "for himself, his heirs, executors, ad-

ministrators and assigns. * * * to and with the said party of the second part (the grantee), his heirs, executors, administrators and assigns, that he will not erect, or cause to be erected, on said lot * * * any building which shall be regarded as a nuisance, or which shall be occupied for any purpose which may render it a nuisance." Plaintiff, through various mesne conveyances, has acquired title to the lot conveyed. Defendant conveyed the adjoining lot by a deed which did not refer to said covenant, and contained no restriction or limitation upon the uses to which it might be put. Subsequently a building was erected thereon which was used as a livery stable so as to constitute a nuisance. Defendant neither caused nor permitted the nuisance. In an action upon the covenant, *held*, that it was personal to defendant, and solely against his own acts; that it did not make him liable for the acts of his grantees or subsequent owners; and so, that no cause of action was established against him. *Clark v. Devoe*. 120

2. Persons who, by their several acts or omissions, maintain a public or common nuisance, are jointly and severally liable for such damages as are the direct, immediate and probable consequences of it. *Simmons v. Emerson*. 319

3. In an action to recover damages for alleged negligence causing the death of S., plaintiff's intestate, these facts appeared: The defendants, E., P. and L., were owners of three adjoining lots on a city street, upon which there were three brick stores, separated by partition walls, extending from the foundations to the roofs; the fronts of said stores were a continuous brick wall of a uniform thickness, which was interlocked with the partition walls. These stores were burned, leaving the front wall and a part of the partition walls standing. The front wall shortly after began to lean toward the street and continued to do so more and more, until it gave way near the partition wall which separated the buildings of L. and P., carrying down the entire

front. Material from the part of the front wall standing on the lots of E. and P., and from their partition wall, fell upon S., who was lawfully on the sidewalk, near the boundary between their lots, and killed him. No part of L.'s wall touched him. *Held*, that the evidence justified findings that the walls left standing became immediately after the fire unsafe, dangerous and liable to fall into the street, and so were a public nuisance; that each of the defendants E., P. and L. was negligent in not removing or supporting the walls on his lot; that the several neglects united and directly caused the walls to fall; and so, that they were jointly liable. *Id.*

PARTIES.

1. During the pendency of an action against a railroad corporation for alleged trespass, a receiver *pendente lite* was appointed in an action in the U. S. Circuit Court to foreclose mortgages which covered all of the corporate property. The receiver was authorized to operate the road, protect his title and possession, defend all suits brought against him and the corporation, and intervene in any suits then pending; and was invested with the authority usually conferred in like cases according to the course and practice of U. S. Equity Courts; the corporation was enjoined from interfering with him in the possession and management of the property. The receiver was, by order of the court, substituted as defendant in the trespass suit; the order provided that the action proceed with like effect as if originally commenced against him. Upon the trial the receiver moved for a dismissal of the complaint on the ground that the action could not be maintained against him. The motion was denied. *Held*, error; that the receiver had no connection with the cause of action, and it could not be charged upon the property in his hands. *Decker v. Gardner*. 334

2. The words "transactions and communications" in the provision of the Code of Civil Procedure

(§ 829), prohibiting a party from testifying as to personal transactions and communications between him and certain deceased persons embrace every variety of affairs which can form the subject of negotiations, interviews or actions between two persons, and include every method by which one person can derive impressions or information from the conduct, condition or language of another. *Heyne v. Doerfler*. 505

— *As under laws of Connecticut, real estate not in that state is exempt from the operation of an assessment for the benefit of creditors, an assignee under such an assignment made in that state cannot, as representative of creditors, bring an action in this state under the act of 1858 (Chap. 314, Laws of 1858), to reach lands situate here fraudulently conveyed by his assignor.* (FOLLETT, Ch. J., dissenting.)
See *N. Tr. Bank v. Wetmore*. 241

— *When trustee appointed in another state under the will of an heir to real estate in this state, a proper party to an action to recover a balance arising on foreclosure of a mortgage upon lands of which the ancestor died seized.*
See *Hauselt v. Patterson*. 349

PARTITION.

1. The provision of the Code of Civil Procedure (§ 841, as amended by chap. 40, Laws of 1889), providing that whenever in an action of partition any portion of the proceeds of sale of the lands has been paid into court or to the county treasurer for any unknown heirs, and remains unclaimed for twenty-five years, such unknown heirs will be presumed to be dead, in any action or proceeding for the distribution and paying over of such proceeds, refers only to unknown heirs who were presumed to be living at the time the money was so paid in, and under said section said unknown heirs may be presumed to have continued to live for twenty-five years after the payment, during which time new heirs may have come into existence, and these may not be presumed to be dead at the expiration of that

period. *People ex rel. v. Ryder*. 500

2. The provision, therefore, of said Code (§ 1582, as amended by chap. 39, Laws of 1889), authorizing the Special Term in an action for partition, in which a portion of the proceeds of a sale has been paid into court or deposited with the county treasurer for unknown heirs and twenty-five years have elapsed without any claim being made thereto by any person entitled thereto, "to decree that such unclaimed portion of such proceeds was vested at the time of such payment in the known heirs of the common ancestor of such unknown heirs and their heirs and assigns," is unconstitutional, as it authorizes the court to divest unknown heirs who may exist and who are not presumed to be dead, and to vest other and different persons with said fund, and thus deprives persons of their property without due process of law. *Id.*

PARTNERSHIP.

1. One who has been a known and recognized partner in a firm, but who has withdrawn therefrom, can only relieve himself from liability for subsequent transactions between his former partner in the firm name and third persons, who are unaware of the change, by giving notice of his withdrawal. *Elmira I. & S. R. M. Co. v. Harris*. 280
2. A notice of dissolution published in a local newspaper, only affects those who previously had not dealt with the firm, but thereafter deal with the remaining members; it does not operate as a notice to one with whom the firm had business relations prior to the publication; as to them, actual notice is necessary. *Id.*
3. *It seems* this rule does not apply to a dormant partner, that is, one who took no part in the business and whose connection with it was unknown. *Id.*
4. The defendants entered into an agreement, by the terms of which

they formed a copartnership under the name of B. & Co., for the purpose of carrying on a business specified. It was agreed that defendant H. should not give his attention to the business, but that he "shall be consulted in the business, and all the plans and operations of the firm shall be made and done with the advice of the firm." The other defendants were to give their whole time and attention to the business. Under this agreement the business was carried on; H. was engaged in other business, but he took part, to some extent, in its financial management and in correspondence with creditors, writing letters in his own name and in that of the firm, and his copartners informed persons dealing with the firm that he was a partner. In an action brought upon an alleged firm indebtedness, H. defended on the ground that before the indebtedness was incurred, he retired from the firm. It appeared that notice of the dissolution was published in a local paper, but that the business was continued in the same firm name. Plaintiff had dealt with the firm before the withdrawal of H., and had no notice of his withdrawal; it had no knowledge in fact that he had ever been a partner; H. also testified that at the time of the formation of the partnership, it was said that it should not be made public and evidence was given on his behalf to the effect that it was not generally understood that he was a partner. *Held* (HAIGHT, J., dissenting), that H. was liable; that under the partnership agreement, he was not a dormant but an active partner; and that a submission of that question to the jury was error; also that the liability of H. was not changed by the fact that plaintiff did not know he was a partner. *Id.*

5. Where a partnership is dissolved by the death of one of the copartners, the survivor is entitled to the possession and control of the assets of the firm, which he may sell, mortgage and dispose of to pay the debts and close up the affairs of the copartnership; in order to do this he may borrow money, and where a third person has in good

faith loaned money for that purpose, which has been faithfully applied in liquidation of the firm debts, an equity is created, for the satisfaction of which the assets of the firm may properly be devoted. (VANN, J., dissenting.) *Durant v. Pierson.* 444

6. P., the surviving member of the firm of H. R. P. & Son, for the purpose of paying firm obligations, borrowed money from the C. N. Bank, for which he gave a note payable on demand, signed with the firm name by him as survivor; he applied this money in payment of firm debts. At the time said note was given the firm was insolvent, but P. and the bank were ignorant of that fact. P., as survivor, made an assignment for the benefit of creditors in which said bank was preferred the amount of said note. In an action to set aside said assignment as fraudulent and void because of this preference, *held* (VANN, J., dissenting), that the claim of the bank was one which, in justice and equity, should be paid out of the firm assets, and so, that its preference did not render the assignment fraudulent. *Id.*

7. *It seems*, that where one member of a firm sells out his interest in the firm to the other members, who continue the business with the firm property, and the sale is subsequently set aside for fraud, the outgoing partner may require his copartners to account to him as trustees for the profits resulting from the business after his retirement. *White v. Reed.* 468

8. Where, however, the retiring partner received on the sale more than the amount of his interest in the capital or assets of the firm, he is not entitled to share in the subsequent profits; the fraud that induced the sale entitles him to full indemnity for any loss suffered thereby, but does not entitle him to recover upon an accounting. *Id.*

9. In an action for such an accounting, the sale was adjudged to have been induced by fraud, defendants were required to account

and it was directed that upon such an accounting plaintiff be charged with the moneys paid and the value of the property transferred to him on the sale. The referee decided that plaintiff received more than the value of his interest in the firm assets, and judgment was entered against him for the excess. *Held*, error; that after the obstacle produced by the sale and release was removed, plaintiff's remedy required an accounting to ascertain whether he was entitled to any, and, if so, what amount, treating his former partners as trustees of the capital in which he had an interest, and it having been found he had no such interest, he was not entitled to share in the subsequent profits; but that defendants had no cause of action or right of recovery against him. *Id.*

PATENTS (FOR INVENTIONS).

1. Where, by an agreement between the parties, a patentee grants to a licensee the right to make and sell his inventions, and the licensee acknowledges the validity of the patent and stipulates to pay royalties, an action to recover the royalties does not arise under any act of congress in relation to patents, and is within the jurisdiction of the state courts. *Hyatt v. Ingalls*. 93
2. In such an action, where part of the relief demanded is a rescission of the agreement because of defendant's breach of the contract, and that relief is granted, plaintiff is entitled to an accounting and payment of royalties up to the time of the entry of judgment, but relief by injunction against future acts on the part of defendant will not be granted. *Id.*
3. A patent for an improvement in illuminated basements and basement extensions, sidewalks, roofs, etc., was issued to plaintiff in 1867, and reissued in 1878. By an agreement made in November, 1878, plaintiff granted to defendants the exclusive right to manufacture and sell within certain territorial limits the illuminated tile work covered by the patent and its reissue. It was provided that the license should last during the continuance of the patent, or any extension or renewal thereof. The licensees recognized the validity of the patent, and expressly consented that it might be reissued by plaintiff as often as she should choose to do so. Defendants agreed to pay a specified royalty for tiles or plates used for the purposes specified in the patent. They manufactured and sold the patented articles, and up to August 1, 1881, paid royalties thereon. In September, 1881, plaintiff obtained a reissue of the patent, and thereafter defendants refused to pay royalties, although they continued to manufacture and sell. Plaintiff thereupon notified them that the license was forfeited. In an action to procure a cancellation of the agreement, an accounting and payment of royalties, and an injunction restraining defendants from selling or using the articles embraced in the patent, defendants set up as a defense that the reissued letters patent were void because they embraced other clauses than those covered by the previous letters, and omitted specifications and claims which were in the latter, and that the state court had no jurisdiction. *Held*, that the action did not arise under any law of congress relating to patents, and was within the state jurisdiction. *Id.*
4. Also *held*, that defendants having acknowledged the validity of the patent and consented to a reissue thereof, were estopped from questioning it. *Id.*
5. Also *held*, that while the reissued letters were apparently broader than the former ones, yet as they substantially embraced the claims represented by the latter, they were invalid only as to the excess, and so defendants were not prejudiced by the reissue; and that as it was a matter simply of comparative construction of the different letters, it could be passed upon by the state court. *Id.*
6. Also *held*, that the service of the notice of forfeiture given by plain-

tiff and the claim of forfeiture in the complaint did not destroy the effect of the contract as an estoppel, as defendants continued thereafter to use and sell the patented articles in the manner authorized by the license; and that they could not assert as a defense that in doing so they did not proceed under it. *Id.*

7. It appeared that in January, 1882, plaintiff brought an action against defendants to recover royalties for the quarter ending November 1, 1881, and such action was pending at the time of the commencement of this action. The recovery in this action included the royalties for that quarter. It appeared, however, that several years before the referee's report was made, upon which final judgment in this action was entered, the former action was discontinued by the consent of defendants' attorneys. *Held*, that the defense of a former action pending was not available. *Id.*

8. The referee refused to find that defendants were liable to account for illuminating tiles when they had inserted glasses in iron which were adapted or could be used for illuminating roofs of areas or basement extensions, and had not shown they were so used; he also refused to find that they were liable to account for all such tiles adapted to such use, manufactured and sold by them to others to be used, as the defendants had not shown were so used. *Held*, no error; that while it was defendants' duty to account for all sales of tiles which were used for the licensed purposes, they were not chargeable under the contract for tiles sold which were not so used, or because they did not know to what use they were in fact applied; and that the burden was upon plaintiff to show that tiles sold by defendants were used for the purposes specified, to entitle her to royalties thereon. *Id.*

PAYMENT.

—When action not maintainable to recover back money paid in satis-

faction of an illegal assessment for a local improvement.

See Pooley v. City of Buffalo. 206

PLEADING.

1. In an action upon contract brought by one member of a firm, defendant may not avail himself of a claim against the firm as a set-off, on the ground of the insolvency of plaintiff's copartners, in the absence of an averment that the firm is insolvent. *Spofford v. Rowan.* 108.
2. Where such a claim was set up by defendant as a counter-claim, *held*, that the failure of plaintiff to reply did not entitle defendant to offset the claim, as the counter-claim does not set up a cause of action against plaintiff; also that it was not necessary for plaintiff to raise the question by demurrer. (Code Civ. Pro. § 499.) *Id.*
3. The complaint herein alleged in substance that defendant wrongfully removed plaintiff's yacht from a certain place in the East river, where she had been laid up for the winter, to another place where she was exposed to danger and that in consequence she sunk and was greatly damaged. Defendant's answer admitted plaintiff's title, the taking and sinking of the yacht, but denied that the taking was wrongful and alleged it was his duty as custodian of the yacht, to remove her to a safe place and that he removed her where he had no reason to apprehend danger. The court charged that "the burden of proof is upon plaintiff and he must establish by a preponderance of evidence that the vessel was removed without authority and without color of authority." *Held*, error; that, under the pleadings, the burden was upon defendant of showing some right to remove the yacht by way of justification. *Blunt v. Barrett.* 117
4. Plaintiff entered into a contract with the defendants for the sale to them of certain shares of stock of a railroad company owned by him, by the terms of which defendants

agreed to pay him, on delivery of the shares, a price specified per share, and in case any other person had been or should be paid by or on account of the defendants, or either of them, any higher price per share for any of the stock of said railroad company, that defendants would pay to plaintiff on demand, in addition to the amount so to be paid to him on delivery, the difference between that amount and the highest price paid to others, and in case, during or after a contemplated visit of one A. to California, plaintiff should become dissatisfied with the sale, that defendants would, upon demand, return to him the shares of stock so sold and delivered by him, and would consent to the cancellation and rescission of the sale. In an action upon the contract the complaint, after setting forth its terms, alleged the delivery of the stock, its acceptance, and the payment to plaintiff of the price specified; also, that afterwards, and during the visit referred to in the contract, plaintiff became dissatisfied, duly notified the defendants thereof, and demanded the return to him of the stock and the cancellation and rescission of the sale, offering to pay to defendants the amount paid to him on delivery with interest, but that defendants neglected, and refused to return the stock or to cancel the sale. It also alleged that defendants paid to other persons higher prices per share for stock of the same railroad company. *Held*, that the complaint set forth two causes of action, one in affirmance of the contract to recover the additional price agreed to be paid, the other based upon the theory of rescission of the contract and a refusal of defendants to return the stock which would entitle defendants to recover its value as for a conversion; that said causes of action were inconsistent; and that a decision of the court on trial requiring the plaintiff to elect as to which cause of action he would rely upon was proper. *Stewart v. Huntington*. 127

5. In an action of replevin to recover possession of property sold by plaintiffs to one L., but left in plaintiffs' possession until after

notes given for the purchase became due and were dishonored, and which had been levied upon by defendants by virtue of an attachment against L., plaintiffs alleged title to the property, and, also, that they "had a special property therein, to wit: A lien for unpaid purchase-money." The defendants' answer denied specifically both of these allegations. No motion was made to make the complaint more definite and certain, and it affirmatively appeared that defendants were neither harmed nor misled by the omission to set forth "the facts upon which the special property depends," as required by the Code of Civil Procedure (§ 1720). *Held*, that the defect was not such as would require a reversal of the judgment. *Tuthill v. Seidmore*. 148

6. A general or specific denial in an action controverts only material allegations, or such facts as the plaintiff would be compelled to prove to establish his cause of action. *Linton v. U. Fireworks Co.* 533
7. In an action by a servant for an alleged breach of the contract of employment, the complaint set up the contract of employment and alleged that plaintiff entered defendant's employ under it; that before its termination defendant, without right or cause, discharged him. The answer admitted the contract, denied the breach, alleged that plaintiff was discharged for cause, and separately specified twelve acts of plaintiff in alleged violation of the contract. Both parties gave evidence tending to sustain the allegations in their respective pleadings, and in addition thereto defendant offered to show other acts of misconduct and unfaithful service on the part of plaintiff not alleged in its answer. This was, upon objection, excluded. *Held*, no error. *Id.*

PRACTICE.

1. Where in an action upon contract brought by one member of a firm, defendant set up as a counterclaim a claim against the firm

which he claimed the right to set-off, on the ground of the insolvency of plaintiff's copartners; *held*, that the failure of plaintiff to reply did not entitle defendant to offset the claim, as the counter-claim did not set up a cause of action against plaintiff; also that it was not necessary for plaintiff to raise the question by demurrer. (Code Civ. Pro. § 499.) *Spifford v. Rowan*. 108

2. *It seems* that where other persons are jointly liable upon a claim sought to be availed of as a set-off, they should be made parties, so that the rights of all may be determined. *Id.*

See APPEAL.
PLEADING.
TRIAL.

PRESUMPTIONS.

1. *It seems* that contracts by one party to procure, for a consideration, a husband or wife for the other, are considered as fraudulent in their character, and the party paying the consideration will be regarded as under a species of imposition or undue influence. *Dural v. Wellman*. 158
2. *It seems* where the charter of a municipality provides that it shall be presumed that every assessment made is "valid and regular, and that all the steps and proceedings required by law were taken and had until the contrary shall be made to appear," this presumption entitles a person whose land is assessed to relief, when the illegality of the assessment is shown, and it rests in something *de hors* the record. *Pooley v. City of Buffalo*. 206
3. In an action to recover money paid upon an assessment on property in Buffalo the court found that certain persons whose lands were assessed filed with the city clerk objections to the roll, and that he reported the filing of such objections to the common council, but did not lay the roll or objections before that body, nor did it at any time have or consider such

objections as required by the city charter (§ 14, tit. 6, chap. 519, Laws of 1870). By the charter (§ 36, tit. 7) it is declared that it shall be presumed that every assessment made under it is valid and regular and that all proceedings required by law were taken unless the contrary appears. *Held*, it could not be assumed that any of such objections were made by the plaintiff or any of his assignors, or that they or any of them went to the validity of the assessment; that as the burden was upon plaintiff to prove the facts entitling him to relief, it was necessary to show that he was or may have been in some manner prejudiced by the failure of the common council to consider the objections made; and that in the absence of any evidence justifying a finding of some fact showing the illegality, the action was not maintainable. *Id.*

4. The provision of the Code of Civil Procedure (§ 841, as amended by chap. 40, Laws of 1889), providing that whenever in an action of partition any portion of the proceeds of sale of the lands has been paid into court or to the county treasurer for any unknown heirs, and remains unclaimed for twenty-five years, such unknown heirs will be presumed to be dead, in any action or proceeding for the distribution and paying over of such proceeds, refers only to unknown heirs who were presumed to be living at the time the money was so paid in, and under said section said unknown heirs may be presumed to have continued to live for twenty-five years after the payment, during which time new heirs may have come into existence, and these may not be presumed to be dead at the expiration of that period. *People ex rel. v. Ryder*. 500

PROMISE.

See CONTRACT.

PUBLIC POLICY.

1. Although a court of equity will not, as a general rule, lend its aid to either of the parties to an illegal

contract, by enforcing its execution or rescinding it, when the parties are not equally guilty, and when the public interest is advanced by allowing the more excusable of the two to sue for relief, the courts will take cognizance of an action for that purpose, and will grant relief by setting aside the contract and restoring the injured party to his original position. *Dural v. Wellman.* 156

2. *It seems* that the business of promoting marriages is against the policy of the law and public interest, and the courts will aid a party who has patronized such a business by relieving him or her from all contracts made, and will grant restitution of any money paid or property transferred. *Id.*

QUESTIONS OF LAW AND FACT.

The question at what age an infant's responsibility for negligence may be presumed to commence, is not one of fact, but of law. *Tucker v. N. Y. C. & H. R. R. Co.* 308

— *When question as to whether parties to an illegal contract are in pari delictu is one of fact.*

See Dural v. Wellman. 156

— *When question of negligence one of fact.*

See Carpenter v. N. Y., N. H. & H. R. Co. 53

Oldenburg v. N. Y. C. & H. R. R. Co. 414

Ford v. L. S. & M. S. R. Co. 493

Hogan v. C. P., N. & E. R. R. Co. (Mem.) 647

— *When question of negligence one of law.*

See Tucker v. N. Y. C. & H. R. R. Co. 308

Wiwironski v. L. S. & M. S. R. Co. 420

Cocks v. Huriland. 426

Chrystal v. T. & B. R. R. Co. 519

RAILROAD CORPORATIONS.

1. *It seems* that a railroad corporation does not undertake to carry and safely deliver the effects of trav-

elers not delivered into its custody, and while money, necessary for the expense of a journey undertaken, which is carried in the trunk of a passenger, is part of his baggage, and if lost while in the custody of the corporation for transportation, it is liable, money in the clothing worn by the passenger is not in its custody, and it is not chargeable for its loss, unless negligence on its part is shown. *Carpenter v. N. Y., N. H. & H. R. Co.* 53

2. A railroad corporation which runs sleeping-coaches on its road, with sections separated from the aisle only by curtains, is bound to have an employe charged with the duty of carefully and continually watching the interior of each car while berths are occupied by passengers. *Id.*

3. *It seems* the mere proof of the loss of money by a passenger while occupying a berth in such a car, does not make out a *prima facie* case against the corporation; some further evidence tending to show negligence on its part must be given. *Id.*

4. In an action to recover for money alleged to have been lost by plaintiff while a passenger in a sleeping-car on defendant's road, the following facts appeared: Defendant runs upon its roads sleeping-cars, with the usual accommodations. Plaintiff purchased and was assigned a lower berth; when he went to bed he placed his pocket-book, containing the money in question, in the inside pocket of his vest, which he placed under his pillow on the side next to the window; the next morning he found his vest under his pillow on the side next to the passage-way, with his pocket-book in his pocket, but the money had been stolen. The upper berth was occupied by a stranger, but was unoccupied when plaintiff arose in the morning. At one end of the car was the porter's closet. A full view of the passage-way of the car could not be had from all parts of the space at that end. The train made a number of stops at large cities during the night. The

porter was the only employe on the car; he acted as conductor, and for his own profit blackened the passengers' boots. The court granted a motion by defendant to dismiss the complaint. *Held*, error, that the evidence was sufficient to put defendant to proof of the care it took of the occupants of the sleeper on the trip in question, and, in the absence of explanation, it was sufficient to require the question, whether plaintiff's loss was caused by defendant's negligence, to be submitted to the jury.

Id.

5. In an action brought to recover damages for the death of B., plaintiff's intestate, who was killed while traveling in an express car in one of defendant's trains, by an accident, caused by defendant's negligence, it appeared that B., at the time of his death, was in the employ of the U. S. Express Company, as messenger; that said company had entered into a contract with a railway company, to the rights and duties of which the defendant had succeeded, by which said railway company agreed to transport the messengers of the express company and certain specified property free of charge; the latter assuming all transportation risks and other liabilities arising in respect thereof, and agreeing to indemnify and protect the former therefrom. The responsibility of the railway company in transporting express freight was limited to cases of negligence, it, "in no event, whether of negligence or otherwise," to be responsible for property "carried by the railway company free of charge." There was no evidence that B. had any knowledge or information of the provisions of the contract. *Held*, that defendant was liable; that B. was a passenger and could not, without his knowledge or consent, be chargeable with the stipulations in the contract; and that while, when he entered into the service of the express company he assumed the ordinary hazards incident to that business, there was no presumption or implied understanding that he took upon himself the risks of injury which he might

suffer through defendant's negligence. *Brewer v. N. Y., L. E. & W. R. R. Co.* 59

6. *It seems* that, as the contract between the companies did not purport to relieve the defendant from its duty to exercise due care for the protection of the messenger, whatever right it could claim to relief from the consequences of its negligence in that respect arose by way of indemnity upon the stipulation of the express company. *Id.*

7. The law requires a traveler on a highway, before crossing a railroad track, to look and listen for the approach of trains, and if he omits to do so and suffers injury, he cannot maintain an action against the railroad company, although it was guilty of negligence. *Tucker v. N. Y. C. & H. R. R. Co.* 308

8. In an action to recover damages for injuries so sustained, the plaintiff must show that he did his duty in this respect, or prove facts from which the inference can reasonably be drawn that he did. *Id.*

9. The question at what age an infant's responsibility for negligence may be presumed to commence, is not one of fact, but of law. *Id.*

10. In the absence of evidence tending to show that a boy twelve years of age was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track an adult would, he must be deemed *vis juris* and chargeable with the same measure of caution as an adult. *Id.*

11. In an action to recover damages for alleged negligence causing the death of T., plaintiff's intestate, the following facts appeared: T. was a boy twelve years old, intelligent, accustomed to attend school and assist the family by his labor; he lived near defendant's road; he was killed by one of defendant's locomotives when attempting to cross its tracks; the day was windy and it was snowing, but not

enough to obstruct the view; the street upon which he was traveling was crossed by four of defendant's tracks; the first was a switch track upon which cars were standing on each side of the street, a passage-way having been left open for teams and individuals to pass along the street. T. stopped in the centre of the switch track facing in the direction of the locomotive which was backing down at a high rate of speed; if he had looked he could have seen 186 feet down the track; from the point where he stood to the center of the track where he was struck and killed, the distance was fourteen feet. T., after changing a bag he was carrying from one shoulder to another, started on; after taking one step he had an unobstructed view down the track on which the locomotive was coming, for two streets; he did not look in that direction after he started. *Held*, that T. was *qui juris* and was guilty of contributory negligence; and that the submission of the question to the jury was error. *Id.*

12. While a receiver appointed *pendente lite*, in an action to foreclose a railroad mortgage, is charged with the duty of operating the road pending the action, the corporation is not dissolved by the appointment; the receiver does not represent the corporation in its individual or personal character, or supercede it in the exercise of its corporate powers, except so far as the mortgaged property is concerned, and in every respect except the possession and management of the mortgaged property the corporation is free to exercise its franchises. *Decker v. Gardner*. 334

13. During the pendency of an action against a railroad corporation for alleged trespass, a receiver *pendente lite* was appointed in an action in the U. S. Circuit Court to foreclose mortgages which covered all of the corporate property. The receiver was authorized to operate the road, protect his title and possession, defend all suits brought against him and the corporation, and intervene in any suits then pending; and was invested with the authority usually conferred in

like cases according to the course and practice of U. S. Equity Courts; the corporation was enjoined from interfering with him in the possession and management of the property. The receiver was, by order of the court, substituted as defendant in the trespass suit; the order provided that the action proceed with like effect as if originally commenced against him. Upon the trial the receiver moved for a dismissal of the complaint on the ground that the action could not be maintained against him. The motion was denied. *Held*, error; that the receiver had no connection with the cause of action, and it could not be charged upon the property in his hands. *Id.*

14. In an action to recover damages for alleged negligence causing the death of O., plaintiff's intestate, it appeared that O. was going south upon the west sidewalk of a city street running north and south, which is crossed by the three tracks of defendant's railroad; the space between the middle and the south track is seven feet. At the crossing there were safety-gates, which were down as O. approached. When they began to rise he went on; he could see nothing south or west as he approached the middle track, his view being obstructed by cars standing thereon, one of which reached half across the sidewalk and projected two feet beyond the rails. O. passed out from behind this car into the space between the middle and south track and was struck by the cross-beam of the tender to a locomotive on the latter, which was backing from the west; the cross-beam projected two feet beyond the track, thus leaving a space of but three feet between it and the car. O. had no knowledge of the locality; he was walking fast with his head down, the sidewalk being rough; he did not look towards the west as he passed beyond the car; the bell on the locomotive was not rung; the gate-man had begun to lower the south gate, which was half-way down when the accident happened; he shouted to O., who paid no attention. *Held*, that the question of

- contributory negligence was properly submitted to the jury; that it could not be held, as matter of law, that O., hearing no bell and conscious of no danger, was bound to look to the west the instant he passed beyond the car; that while bound to use his eyes he was not bound to use them in a particular manner or at a particular instant of time, also that it was a question for the jury as to whether he heard the call of the gateman. *Oldenburg v. N. Y. C. & H. R. R. Co.* 414
15. While want of contributory negligence, on the part of a person killed at a railroad crossing, may be established by inferences drawn from the circumstances, such an inference may not be drawn simply from a presumption that a person exposed to danger will exercise care and prudence in regard to his own safety. *Witcrowski v. L. S. & M. S. R. Co.* 420
16. In an action to recover damages for alleged negligence, causing the death of W., plaintiff's intestate, it appeared that W., while passing along a city street, in attempting to cross one of defendant's tracks, was struck and killed by the tender of a locomotive which was backing down on the track drawing a caboose. It was dark at the time, but quiet, and lights were burning in the cupola of the caboose; W. had crossed over three tracks before reaching the one where the accident occurred; some cars were standing on the first track which came within about twenty feet of the street. This track is about fifty feet distant from that on which W. was killed; the latter is straight for a long distance each way from the street. No evidence was given tending to show that W. looked or listened before reaching defendant's tracks; plaintiff, his wife, who was following closely behind him, testified that she looked and listened when she first approached the tracks, but saw no light or car approaching. *Held*, that the evidence failed to show want of contributory negligence; and that a refusal to nonsuit the plaintiff was error. *Id.*
17. It is the duty of a railroad company, transporting lumber upon open cars, to adopt some system for loading, having regard for the safety of its servants, and, *it seems*, of those traveling over its road and of all persons who may be in the vicinity of such cars. *Ford v. L. S. & M. S. R. Co.* 493
18. In an action to recover damages for the alleged negligent killing of F., plaintiff's intestate, who was a switchman in defendant's employ, it appeared that he was killed while at his post of duty by being struck by heavy timbers that fell from a passing open car which was improperly loaded. Defendant furnished good cars and stakes, but it had no rule, method or system in reference to the loading of lumber or timber; the manner of loading being left to the discretion of its employees. It had adopted a general rule requiring its employees "to attend to the loading of all freight, whether loaded by station men or by shippers, to see that it is safely stored, and so that it cannot fall off the cars." Plaintiff proved that on other roads a verbal rule existed requiring that in all cases, no matter how short the distance, lumber, whenever loaded above the sides of a car, should be secured by stakes on the sides and stays over the top. *Held*, that the evidence justified the submission to the jury of the question as to whether defendant had made a proper and sufficient rule with respect to the loading of cars with lumber; and that a finding in the negative was sufficient to sustain a verdict against it. *Id.*
19. To charge a railroad corporation in an action for negligence, it is not sufficient to prove a negligent act on its part; it must be made to appear that the injury complained of was sustained by reason of such act. *Chrysal v. T. & B. R. R. Co.* 519
20. Plaintiff, an infant about seventeen months old, escaped from his mother's house near a railroad crossing by crawling under a gate which was fastened, went upon the track, was struck by a train and injured. In an action to re-

cover damages for the injury, it appeared that the bell on the locomotive was not rung or the whistle sounded eighty rods from the crossing as required by the statute. There was no evidence authorizing a finding that had the statute relating to signals at railroad crossings been complied with the mother's attention would have been called in time to have enabled her to rescue the child, or that the injury might otherwise have been prevented. *Held*, that the testimony did not authorize a recovery.

Id.

21. Neither the General Railroad Act (Chap. 140, Laws of 1850), nor the acts amendatory and supplementary thereto, confer upon a company incorporated under it the right to build an elevated railroad in the streets of a city. *Schaper v. B. & L. I. Cable R. Co.* 630

22. A corporation, therefore, organized under said act for the purpose of constructing such a road in the streets of the city of Brooklyn, has no power so to do without first complying with the conditions of the charter of said city (§ 23, tit. 19, chap. 863, Laws of 1873), prescribed as prerequisites to the right to construct a railroad in its streets. *Id.*

— *Contract as to sale of railroad stock construed.*

See Stewart v. Huntington. 127

— *When evidence of contributory negligence sufficient to require submission of question to jury.*

See Hogan v. C. P., N. & E. R. R. Co. (Mem.) 647

RECEIVER.

1. One B. died leaving a will, by which he gave his residuary estate to his executors in trust, for the benefit of his four children, with power to sell all or any part thereof, and directed that the same be distributed "in such manner and form and at such time or times as shall in their judgment be for the best interests of my said children." The executors sold a portion of the personal property and deposited a portion

of the proceeds in the defendant's bank to the credit of the estate of B. Said executors made an apportionment among all the legatees, and drew a check on defendant to the order of F., one of the legatees, for a balance due him and mailed it to him. F. indorsed the check in blank, and, after passing through several hands, it was paid by defendant March 10, 1888, in the usual course of business. It was not certified and had not been presented before. Prior to such payment a judgment had been recovered against F., and a third-party order in supplementary proceedings based thereon granted and served upon defendant's cashier; this order contained the usual injunction clause. Plaintiff was appointed receiver; after he had qualified, he demanded of defendant the amount on deposit in the account of the estate of B. belonging to F., "or due him from it;" this demand was refused. F. had no notice of the proceedings in which plaintiff was appointed receiver. In an action to recover the portion of the deposit alleged to belong to F., *held*, that in order to recover plaintiff was bound to show that when the order was served on defendant, it had in its possession or under its control certain personal property then belonging to F., or that it then owed him a debt; that the relation between B.'s executors and defendant was that of creditor and debtor only, and in a legal sense they had no money in the bank, but simply a debt against it to the amount of the deposit; that the apportionment and distribution being simply an agreement by the executors among themselves, and so, subject to revocation, and being unaccompanied by any assignment, oral or written, although followed by the giving of a check by them, did not effect a change of title to said debt or any part thereof, or operate as a transfer to the payee of any right as against the bank; and so, that plaintiff failed to establish a cause of action. *O'Connor v. Mechanics' Bank.* 824

2. *It seems that jurisdiction to appoint a receiver of a corporation*

upon its dissolution is wholly statutory. Such a receiver is the representative of the corporate body, and in this state he is vested with the title to and is made trustee of the corporate property, and for the purpose of administering thereon and winding up the affairs of the corporation, he succeeds to its powers and franchises and possesses generally all the powers and authority conferred by statute upon the assignees of insolvent debtors. *Decker v. Gardner*. 334

3. The power, however, of appointing a receiver, *pendente lite*, is incidental to the jurisdiction of a court of equity. Such a receiver is a mere temporary officer of the court; he does not possess the power of a permanent receiver or any legal power except such as is specifically conferred upon him by order of the court; his functions are limited to the care and preservation of the property committed to his charge. *Id.*

4. While a receiver appointed *pendente lite*, in an action to foreclose a railroad mortgage, is charged with the duty of operating the road pending the action, the corporation is not dissolved by the appointment; the receiver does not represent the corporation in its individual or personal character, or supercede it in the exercise of its corporate powers, except so far as the mortgaged property is concerned, and in every respect except the possession and management of the mortgaged property the corporation is free to exercise its franchises. *Id.*

5. During the pendency of an action against a railroad corporation for alleged trespass, a receiver *pendente lite* was appointed in an action in the U. S. Circuit Court to foreclose mortgages which covered all of the corporate property. The receiver was authorized to operate the road, protect his title and possession, defend all suits brought against him and the corporation, and intervene in any suits then pending; and was invested with the authority usually conferred in like cases according

to the course and practice of the U. S. Equity courts; the corporation was enjoined from interfering with him in the possession and management of the property. The receiver was, by order of the court, substituted as defendant in the trespass suit; the order provided that the action proceed with like effect as if originally commenced against him. Upon the trial the receiver moved for a dismissal of the complaint on the ground that the action could not be maintained against him. The motion was denied. *Held*, error; that the receiver had no connection with the cause of action, and it could not be charged upon the property in his hands. *Id.*

6. A receiver appointed in supplementary proceedings under the Code of Civil Procedure is vested with the legal title to all the personal property of the judgment debtor; he also represents the creditor under whose judgment he was appointed, and has the same right the creditor possesses to prosecute actions to set aside all transfers of property made by the debtor to defraud his creditors. *Manderville v. Avery*. 376

7. The rights of the receiver in this respect are not confined to the property fraudulently assigned; he may follow the proceeds of the sale thereof in the possession of any person not a *bona fide* owner or holder. *Id.*

8. The rule that where a series of orders appointing receivers of the property of a debtor have been granted, if an earlier order becomes inoperative for any cause, the advantage of priority falls to those remaining in the order in which they were made, does not apply to a trust fund or to the estate of a deceased person, the disposition or distribution of which, when the rights of creditors are involved, is governed by law. *Willis v. Sharp*. 406

9. Where a receiver, appointed in an action, has paid out the fund in his hands in good faith and in obedience to orders of the court to parties not entitled thereto, he

cannot be compelled to make restitution. *Id.*

10. The will of S., after providing for the payment of debts, etc., gave all her estate to her executors, in trust for her son, with directions that they carry on some business for his benefit. One of the executors alone qualified, who continued to carry on a business in which the testatrix had been engaged. In so doing he incurred debts to plaintiffs for goods purchased. In an action brought by them against the executor, as such, a judgment was recovered, which the defendant was directed to pay out of the funds in his hands; which judgment was affirmed by this court (113 N. Y. 586). Pending the appeal to it an order was made appointing R. as receiver and directing defendant to transfer to him all the property of the estate in his hands; also directing said receiver to pay to plaintiffs the amount of said judgment, with interest and costs, and to hold the balance subject to the order of the court. Subsequently plaintiffs recovered another judgment, and by order the receivership was extended to the second action. C. thereafter recovered a judgment against defendant, as executor, whereby, after reciting the appointment of R. as receiver in the two former actions, it was adjudged that he, "after satisfying the obligations of the said prior receiverships," pay to C. the amount of his judgment. Pending an appeal from the order in plaintiffs' first action, orders were granted directing R. to pay out of the fund the amount of the second judgment; to retain sufficient to pay the first judgment during the pendency of the appeal therefrom, and to pay the balance on C.'s judgment. Which order R. complied with. The order in the first action was reversed (115 N. Y. 396), and thereupon R. paid to C. the balance in his hands, less his commissions and expenses. Subsequently, on motion of defendant, whereupon it appeared that S. was indebted, at the time of her death, to an amount largely exceeding the fund delivered to R., he was ordered to pay defendant the

amount of the plaintiffs' first judgment, with interest from its date, and plaintiffs were ordered to refund to him the amount of their second judgment so paid to them, and the amount retained by the receiver for commissions, etc. *Held*, that while R. was protected so far as the payments were made by him pursuant to the orders, he had no specific directions to pay out the amount he had been directed to retain pending the appeal, as the direction in the order appointing him was defeated by its reversal; that the reversal did not authorize him to pay on the C. judgment the amount so retained, but he held it simply subject to the direction of the court; that while plaintiffs' judgment established their claims against the estate, they had no right to appropriate to their payment the estate of the testatrix to the exclusion of her creditors; that the sum they were entitled to was dependent upon a distribution to be made by the surrogate; that defendant was so far the representative of the creditors of the estate, that he could, and it was his duty to take steps to have the fund restored to him with a view to its proper distribution; that the receiver was properly directed to pay over the amount of the first judgment so retained by him, but was not chargeable with interest, save from the time he made the payment therefrom to C.; that plaintiffs were not entitled to apply upon their second judgment the money paid to them by the receiver, and were properly required to refund it, but were not required to pay to defendant the commissions, etc., of the receiver, as they were included in the sum which the receiver was directed to restore to plaintiffs. *Id.*

RECOVERY OF POSSESSION OF PERSONAL PROPERTY.

See REPLEVIN.

RELEASE.

1. In an action upon an executor's bond it appeared that the plaintiff

and the beneficiaries under the will had executed releases, to one of the two co-sureties upon the bond, from all liability under it to the extent of one-half of the penalty thereof, the releases stating that they were intended to operate as a satisfaction and discharge of one-half of the obligation of the bond so that the surety should be "released from all claim or demand for contribution on the part of his co-surety." Also, that they should not be construed as affecting in any manner any claim or demand against said co-surety. *Held*, that the releases did not operate to discharge the co-surety; but that he remained liable to the extent of one-half of the penalty of the bond. *Hood v. Hayward*. 1

2. Where a release of one of two joint debtors contains an express provision that it shall not affect or impair the claim of the creditor against the other debtor, the latter is not discharged. *Whittemore v. Judd L. & S. Oil Co.* 565

3. Defendant, the J. L. & S. Oil Co., brought an action upon an alleged joint claim against T. & H. T. alone defended, denying any liability on his part. The action was determined in favor of the plaintiff therein; one roll was filed, but separate judgments were entered against the defendants for different amounts, the one against T. being the greater by the amount of the costs and interest. In an action to restrain the collection of the judgment against H., *held*, that the judgments could not be considered as joint; and that a release of T. did not, in the absence of any claim of payment by either debtor, affect the right of the judgment creditors as against H. *Id.*

REMEDIES.

1. Where, by an agreement between the parties, a patentee grants to a licensee the right to make and sell his inventions, and the licensee acknowledges the validity of the patent and stipulates to pay royalties, in an action to recover the royalties where part of the relief demanded is a rescission of the agreement because of defendant's

breach of contract, and that relief is granted, plaintiff is entitled to an accounting and payment of royalties up to the time of the entry of judgment, but relief by injunction against future acts on the part of defendant will not be granted. *Hyatt v. Ingalls*. 93

2. *It seems* that while a mortgage creditor has the right to seek payment of his debt from the personal estate of the deceased mortgagor, a court of equity will not permit him to do so in the first instance to the prejudice of other creditors, but he will be required to resort to the land covered by the mortgage, and will only be permitted to seek payment of the deficiency from the personalty. *Hauselt v. Patterson*. 349

3. The remedy of the mortgage creditor is not confined to the mortgaged premises; it was designed to make the realty finally chargeable with the mortgage debt, and when, with the mortgaged premises, the heir inherited other lands of the same ancestor, that he should take them all *cum onere* the mortgage debt. *Id.*

4. It was not intended, however, to give such creditor a preference over other creditors in respect to the real estate not covered by the mortgage when there is a deficiency of the personalty to pay the other debts. The only substantial advantage the mortgage creditor has over other creditors in respect to the lands not covered by the mortgage is that his right of action is not dependent upon a sufficiency of personal assets. *Id.*

5. The preference of the mortgage creditor in the mortgaged premises is only available to him by foreclosure. *Id.*

6. When the land has not been aliened by the heirs or devisees the remedy is by action in equity having the nature of a proceeding *in rem* to reach the land. (2 R. S. 454, § 47; Code Civ. Pro. § 1852.) *Id.*

7. While the legislature has power to provide other and new rem-

edies, laws of this character, intended to have a retroactive operation, must be strictly construed, especially in so far as they provide for the vesting of property. *Prople ex rel. v. Ryder.* 500

—A party may not repudiate a contract for work for the purpose of barring the contractor's claim for his work and at the same time seek to make it effectual for the recovery of damages for its breach.

See Lennon v. Smith. 578

REPLEVIN.

1. In an action of replevin to recover possession of property sold by plaintiffs to one L., but left in plaintiffs' possession until after notes given for the purchase became due and were dishonored, and which had been levied upon by defendants by virtue of an attachment against L., plaintiffs alleged title to the property, and, also, that they "had a special property therein, to wit: A lien for unpaid purchase-money." The defendants' answer denied specifically both of these allegations. No motion was made to make the complaint more definite and certain, and it affirmatively appeared that defendants were neither harmed nor misled by the omission to set forth "the facts upon which the special property depends," as required by the Code of Civil Procedure (§ 1720). *Held*, that the defect was not such as would require a reversal of the judgment. *Tuthill v. Skidmore.* 149

2. At the beginning of the trial defendants moved that plaintiffs be compelled to elect whether they would seek to recover on the ground of ownership or of a lien for unpaid purchase-money. The court decided to first hear the evidence, and defendants excepted. At the close of plaintiffs' case, defendants offering no evidence, both parties asked the court to direct a verdict. *Held*, that as it did not appear defendants were harmed by the ruling of the court, it was not a ground of review; that as the two inconsistent claims ap-

peared in the complaint, defendants should, before answering, have moved that plaintiffs be compelled to elect. *Id.*

3. Also *held*, that plaintiffs, by alleging and asserting on the trial absolute ownership, and also a special interest or lien, did not thereby waive their special interest or lien, as the inconsistency between the two claims arose not from the facts, but related wholly to the legal conclusions to be drawn from conceded facts. *Id.*

4. In an action to recover possession of goods sold and delivered to defendants on the ground that the sale was induced by false and fraudulent representations made by them, the burden is upon the plaintiff to establish that such representations were made with intent to deceive and defraud. *Coffin v. Hollister.* 644

SALES.

In an action to recover possession of goods sold and delivered to defendants on the ground that the sale was induced by false and fraudulent representations made by them, the burden is upon the plaintiff to establish that such representations were made with intent to deceive and defraud. *Coffin v. Hollister.* 644

SATISFACTION.

See ACCORD AND SATISFACTION.

SET-OFF.

1. At law a joint debt cannot be set off against a separate debt, or a separate debt against a joint debt, and equity will only interpose when the circumstances are such as to render it necessary in order to save the claim of a party, and the facts must be alleged entitling him to equitable relief. *Spofford v. Rouan.* 108
2. In an action upon contract brought by one member of a firm, defendant may not avail himself of a claim against the firm as a set-off, on the ground of the insolvency of

plaintiff's copartners, in the absence of an averment that the firm is insolvent. *Id.*

3. Where such a claim was set up by defendant as a counter-claim, *held*, that the failure of plaintiff to reply did not entitle defendant to offset the claim, as the counter-claim does not set up a cause of action against plaintiff; also, that it was not necessary for plaintiff to raise the question by demurrer. (Code Civ. Pro. § 499.) *Id.*

4. *It seems* that where other persons are jointly liable upon a claim sought to be availed of as a set-off, they should be made parties, so that the rights of all may be determined. *Id.*

SHERIFF.

1. In an action against a sheriff for a failure to return an execution within sixty days after its delivery to him, proof of the delivery and failure to return establishes *prima facie* plaintiff's right to recover the full amount defendant was commanded by the execution to collect. *Pach v. Gilbert.* 612

2. In such an action it was conceded that O., the judgment debtor against whom the execution was issued, did not have, at the date it was issued, or at any time thereafter, any property out of which it could have been satisfied. It appeared, however, that a warrant of attachment had been issued in the action and delivered to defendant as sheriff, who, by virtue thereof, levied upon sufficient property of the debtor to satisfy plaintiff's claim. The judge who granted the warrant, on an *ex parte* application, made an order vacating it and the sheriff thereupon released the goods from the levy; they were thereafter levied upon by him, by virtue of executions issued upon other judgments against O. The latter, subsequent to such levy, made an assignment for the benefit of creditors. Said order was thereafter, upon application of plaintiff, set aside. The order setting it aside contained this provision: "the lien of said attachment is restored." On appeal to this court the order was

modified by striking out this provision and, as so modified, affirmed. While the attachment, the order vacating it and the order setting aside the order of vacation were in his hands, the sheriff sold the property under said executions and the proceeds of sale, which were more than sufficient to satisfy plaintiff's execution, were wholly applied by the sheriff upon the other executions. *Held*, that while the order restoring the vitality of the attachment did not operate to affect or change the rights which the assignee had acquired in the property under said assignment, yet it gave to the attachment validity in the hands of the sheriff as of the date when it was issued, and it became his duty to apply sufficient of the proceeds of the sale so made by him upon the other executions in satisfaction of plaintiff's execution (Code Civ. Pro. §§ 697, 1406, 1407); that the modification of the order restoring the attachment did not affect plaintiff's rights in this respect; and that, therefore, defendant failed to show in mitigation that plaintiff was not injured by his action. *Id.*

STATUTES.

- §§ 10, 11, 24, *Chap. 40, Laws of 1848.*
- See Hardman v. Sage*, 25.
- 1 R. S. 723, § 10,
- 1 R. S. 725, § 85.
- See Griffin v. Shepard*, 70.
- § 14, *tit. 6, chap. 519, Laws of 1870.*
- § 86, *tit. 7, chap. 519, Laws of 1870.*
- See Pooley v. City of Buffalo*, 206.
- 2 R. S. 173, § 98.
- *Chap. 314, Laws of 1858.*
- See Nat. Tr. Bank v. Wetmore*, 242.
- *Chap. 265, Laws of 1848.*
- 1 R. S. 520, § 99.
- *Chap. 311, Laws of 1861.*
- See Horey v. Vil. of Haverstraw*, 275.
- § 10, *Chap. 40, Laws of 1848.*
- See Nat. Tube Works Co. v. Gillilan*, 302.
- 1 R. S. 749, § 4.
- 2 R. S. 454, § 47.
- See Hauselt v. Patterson*, 350.
- § 37, *Chap. 480, Laws of 1837.*
- *Chap. 594, Laws of 1868.*
- See In re Powers*, 361.

- 2 R. S. 63, § 40.
- See *In re Conroy*, 455.
- Chap. 39, *Laws of 1889*.
- Chap. 40, *Laws of 1889*.
- See *People ex rel. v. Ryder*, 500.
- Chap. 355, *Laws of 1880*.
- Chap. 299, *Laws of 1861*.
- Chap. 748, *Laws of 1865*.
- Chap. 885, *Laws of 1867*.
- Chap. 759, *Laws of 1869*.
- Chap. 608, *Laws of 1870*.
- See *McLaughlin v. Miller*, 511.
- 2 R. S. 90, § 43.
- See *In re McGowan*, 526.
- Chap. 433, *Laws of 1866*.
- Chap. 907, *Laws of 1869*.
- See *Crowninshield v. Bd. of Supervisors*, 583.
- 2 R. S. 139, § 6.
- See *Price v. Price*, 589.
- Chap. 140, *Laws of 1850*.
- § 23, tit. 19, chap. 863, *Laws of 1873*.
- See *Schaper v. B. & L. I. Cable R. Co.*, 630.
- 1 R. S. 389, § 4.
- 1 R. S. 506, § 24.
- Chap. 287, *Laws of 1871*.
- Chap. 355, *Laws of 1872*.
- See *Hampton v. Hamsher*, 684.

STATUTE OF FRAUDS.

1. S., defendant's testator, agreed with W., his nephew, plaintiff's assignor, that if he would refrain from drinking liquor, using tobacco, swearing and playing cards or billiards for money, until he should become twenty-one years of age he would pay him \$5,000. W. performed his part of the agreement; he became of age in 1875. Soon thereafter he wrote to S. advising him of such performance, stating that the sum specified was due him, and asking payment. S. replied admitting the agreement and the performance and stating that he had the money in bank, set apart, which he proposed to hold for W. until the latter was capable of taking care of it. It was thereupon agreed between the parties that the money should remain in the hands of S. on interest. In an action upon the agreement, it did not appear upon the face of the complaint that the original agreement was not in writing, and so prohibited by the Statute of Frauds, because not to be per-

formed within a year. *Held*, that as no such defense was set up in the answer, it was not available. *Hammer v. Sidway*. 538

2. Also *held*, that the statements of S., subsequent to the date of final performance on the part of the promisee, was a waiver of such defense. *Id.*

STATUTE OF LIMITATIONS.

See *LIMITATION OF ACTIONS*.

STIPULATION.

When an appeal is taken to this court from a provision inserted in an order of General Term granting a new trial, which the court had no authority to make, the stipulation, that in case of affirmance, judgment absolute shall be rendered against the appellant, required by the Code (Subd. 1, § 191) need not be given. *Beman v. Todd*. 114

STOCK.

— *Contract as to sale of railroad stock construed*.

See *Stewart v. Huntington*. 127

STOCK BROKERS.

In an action to recover a balance claimed to be due upon the purchase and sale by O., C. & Co., plaintiff's assignors, for defendant, of stocks purchased and carried upon margins, it appeared that in filling defendant's orders, O., C. & Co. made its purchases and sales, without his knowledge, through brokers in New York, who did not know that defendant was interested in the transaction, but who bought and paid for the stock ordered and carried them on margins for O., C. & Co. On August fifteenth, defendant directed O., C. & Co. to sell certain shares of stock so purchased for him at a price stated; this price could have been obtained until August twentieth, when the stock went down. O., C. & Co. neglected to sell as directed and did not notify defendant of such neglect until August twenty-ninth.

On October seventh, O., C. & Co. made a general assignment to plaintiff for the benefit of creditors; the brokers in New York sold the stock carried for defendant without his knowledge; he was not at that time in default to O., C. & Co. The referee found that defendant never assented to, waived or acquiesced in the failure of O., C. & Co. to sell as directed, and allowed him as damages the difference between the price at which he ordered the sale and the price at which said stock was sold. *Held*, no error; that defendant was not required, when he learned that his instructions to sell had not been executed, to notify O., C. & Co. that he abandoned all claim to the stock and held them responsible for its value; nor was he under any obligation, in order to protect his defaulting agents, to pay the purchase-price, take the certificates and sell them; and that the correct rule of damages was adopted. *Allen v. McConihe*. 842

STOCKHOLDER.

1. The year within which, under the provisions of the General Manufacturing Act (§ 24, chap. 40, Laws of 1848), an action must be begun for the recovery of a debt owing by a corporation organized under it, so as to lay a foundation for a recovery against a stockholder under the provision (§ 10) making stockholders liable for the debts of the corporation until the whole capital stock has been paid in and a certificate as prescribed filed, begins to run on the day when the debt first became due. *Hardman v. Sage*. 25
2. If, therefore, the time of the payment of a debt is extended by the taking of a promissory note, which is sued within a year from the date of its maturity, but more than a year after the debt became due, the claim of the creditor against the stockholders is lost and they cannot be charged with the payment of the debt. *Id.*
3. Under the provision of said act (§ 11), which requires a certificate to be made within thirty days after

the payment of the last installment of the capital stock, stating the amount of the capital as fixed and paid in, "which certificate shall be signed and sworn to by the president and a majority of the trustees," in order to release the stockholders from liability, the certificate must be sworn to; an acknowledgment, without verification, is not sufficient. *Id.*

4. A shareholder in a corporation is not chargeable with constructive notice of resolutions adopted by the board of directors, or of provisions in the by-laws regulating the mode in which its business shall be transacted with its customers, and when dealing with the corporation as a customer his rights are not limited by its regulations or by-laws not brought to his knowledge. *Pearsall v. W. U. Tel. Co.* 256
5. To establish a cause of action under the provision of the General Manufacturing Act (§ 10, chap. 40, Laws of 1848), making the stockholders of a company organized under it individually liable to the creditors of the company, to the amount of their stock, for all its debts, until the whole amount of the capital stock has been paid in, all that is required is to show that a valid debt was contracted before the capital stock was paid in, either in cash or in property honestly regarded as a fair equivalent to cash. *Nat. Tube Works Co. v. Gilfillan*. 802
6. The liability covers "all debts and contracts made by said company," irrespective of the circumstances under which they were made. There is no exemption from liability, because credit was imprudently given by the creditor, or because he gave credit upon the supposition that the property of the corporation was sufficient to pay its debts. *Id.*
7. By proof that the stock of the company has been issued as full-paid stock which has not been fully paid, a legal fraud is established; it is not necessary to show otherwise an actual fraudulent intent. *Id.*

8. So, also, if it be shown that the stock was issued in payment for property, with knowledge on the part of its trustees that the value of the property was much less than the amount of the stock, no other fraudulent intent than that which is evidenced by the action of the trustees need be shown to authorize a recovery. *Id.*

SUPPLEMENTARY PROCEEDINGS.

1. A receiver appointed in supplementary proceedings under the Code of Civil Procedure is vested with the legal title to all the personal property of the judgment debtor; he also represents the creditor under whose judgment he was appointed, and has the same right the creditor possesses to prosecute actions to set aside all transfers of property made by the debtor to defraud his creditors. *Mandeville v. Avery.* 876

2. The rights of the receiver in this respect are not confined to the property fraudulently assigned; he may follow the proceeds of the sale thereof in the possession of any person not a *bona fide* owner or holder. *Id.*

— *Where a judgment creditor holds an uncertified check against a general bank account of the drawer, and in supplementary proceedings based upon a third-party order served upon the cashier of a bank a receiver is appointed, he cannot, on demand of the amount of the check, maintain an action against the bank to recover amount of check, as the check does not operate to transfer to the payee any right as against the bank.*

See O'Connor v. Mechanics' Bank. 824

TAXATION.

See ASSESSMENT AND TAXATION.

TELEGRAPH COMPANIES.

1. When a telegraph company receives without conditions, a message for transmission, among the other obligations implied, is the

duty on its part to exercise due diligence to accurately transmit and promptly deliver the message; it does not insure accurate transmission and prompt delivery, but undertakes to exercise due diligence in these respects. *Pearnill v. W. U. Tel. Co.* 256

2. In an action against a telegraph company for damages for failing to accurately or promptly deliver a message, the plaintiff makes out a *prima facie* case of negligence, by proving the delivery to it of the message, and that it was inaccurately or not promptly delivered. *Id.*

3. A telegraph company incorporated under the General Telegraph Act (Chap. 265, Laws of 1848, as amended) of this state may, by contract, limit its liability for mistakes or delays in the transmission or delivery or for non-delivery of messages, caused by the negligence of its servants if the negligence be not gross, to the amount received for sending the dispatch; but such a company cannot, by notice, limit its liability in this respect, unless it is brought to the personal knowledge of the sender of the message and he assents to it. (*BRADLEY and BROWN, JJ., dissenting.*) *Id.*

4. Plaintiff, who was a member of a firm of stockbrokers doing business in the city of New York, while absent from the city, delivered a telegram to defendant, directed to his firm, written upon a sheet of blank paper, directing the purchase of certain shares of stock. Through the mistake of the operator, the message as sent, was directed to plaintiff individually, and in consequence it remained unopened until his return the next day after its receipt, when the purchase was made, the stock, however, had meanwhile risen in the market. *Held*, that defendant was chargeable with negligence; and that plaintiff was entitled to recover as damages the difference between the market value of the stock at the time of the receipt of the message and the sum paid for it. *Id.*

5. Defendant proved that it had, for a long time previous to the sending of the message, used a blank form upon which messages were usually written. The blank contained printed matter in the form of an agreement between the sender of the message and the company to the effect that the company should not be liable for mistakes or delays in the transmission or delivery or for non-delivery of messages beyond a certain amount specified. Plaintiff testified in substance that he had been familiar for a long time with the general appearance of the blanks, had frequently sent messages written thereon, and had them lying on his office table ready for use, but that he never in fact, before sending the message in question, read any of the printed matter or had any knowledge of the terms thereof. The court ruled that the terms were not binding on the plaintiff. *Held* (BRADLEY and BROWN, JJ., dissenting), no error. *Id.*

TITLE.

Payment by an assignee for the benefit of creditors, to a preferred creditor of the assignor of the amount of a debt honestly due him, pursuant to the directions in the assignment, before any lien has been obtained upon the fund, is effectual to vest title in such creditor to the money so paid, although the assignment, in an action subsequently commenced is adjudged fraudulent and void as against the creditors. *Knower v. Cent. Nat. Bank.* 552

TOWNS.

1. A town, by bonding itself in accordance with the statute, and causing a railroad to be built, creates a new and additional property, which becomes the subject of taxation; the remainder of the county is, for the time being, deprived of the benefit to be derived from the taxation thereof, so that the town may reap the benefits by having the taxes applied in satisfaction of its bonded indebtedness; and thus the sinking fund provided for by the statutes (Chap.

907, Laws of 1869, as amended) is, up to the time the bonds become due and payable, a fund the town has an absolute right to have applied in payment of its bonds. *Crowninshield v. Bd. Suprs.* 538

2. In 1871 the town of I. pursuant to the provisions of the act of 1866 (Chap. 433, Laws of 1866), issued its bonds in aid of the construction of a railroad through the town. The state and county taxes collected from the railroad company upon the assessed valuation of its property in the town from the years 1872 to 1887 were paid over to the county treasurer, who used them in the payment of state taxes and county indebtedness, and no money was set apart by him as a sinking fund to pay the bonds so issued. The town taxes so assessed and collected were paid over to the supervisor of the town and used by him in paying town expenses. Said bonds were paid by the town from moneys raised by general tax on property in the town, including that of the railroad company. Upon a case submitted under the Code of Civil Procedure (§ 1279), *held*, that the town was entitled to recover of the county the amount of the state and county taxes so paid to the county treasurer within six years prior to the submission; and that the failure of the town to pay over the amount of town taxes collected from the railroad company did not establish a waiver or constitute an estoppel. *Id.*

3. Also *held*, that the county was not entitled to have the stock of the railroad company received by the town in exchange for its bonds, sold and the proceeds applied in payment of said bonds; that the town had the absolute right to have the sinking fund provided for by law applied in payment of the bonds without regard to the stock. *Id.*

TOWN BONDING.

See TOWNS.

TRIAL.

1. In every case triable by the court without a jury, or by a referee, if

evidence is presented, there must be a decision of the court or a report of the referee stating separately the facts found and the conclusions of law based thereon, as required by the Code of Civil Procedure (§ 1022); in the absence thereof the judgment cannot be reviewed. *Wood v. Lary.* 88

2. *It seems*, however, this rule does not apply where the complaint was dismissed before the introduction of testimony, or where judgment was rendered on the pleadings. *Id.*

3. The complaint herein alleged in substance that defendant wrongfully removed plaintiff's yacht from a certain place in the East river, where she had been laid up for the winter, to another place where she was exposed to danger, and that in consequence she sunk and was greatly damaged. Defendant's answer admitted plaintiff's title, the taking and sinking of the yacht, but denied that the taking was wrongful, and alleged it was his duty as custodian of the yacht, to remove her to a safe place and that he removed her where he had no reason to apprehend danger. The court charged that "the burden of proof is upon plaintiff and he must establish by a preponderance of evidence that the vessel was removed without authority and without color of authority." *Held*, error: that, under the pleadings, the burden was upon defendant of showing some right to remove the yacht by way of justification. *Blunt v. Barrett.* 117

4. Plaintiff entered into a contract with the defendants for the sale to them of certain shares of stock of a railroad company owned by him, by the terms of which defendants agreed to pay him, on delivery of the shares, a price specified per share, and in case any other person had been or should be paid by or on account of the defendants, or either of them, any higher price per share for any of the stock of said railroad company, that defendants would pay to plaintiff on demand, in addition to the amount so to be paid to him on delivery,

the difference between that amount and the highest price paid to others, and in case, during or after a contemplated visit of one A. to California, plaintiff should become dissatisfied with the sale, that defendants would, upon demand, return to him the shares of stock so sold and delivered by him, and would consent to the cancellation and rescission of the sale. In an action upon the contract the complaint, after setting forth its terms, alleged the delivery of the stock, its acceptance, and the payment to the plaintiff of the price specified; also, that afterwards, and during the visit referred to in the contract, plaintiff became dissatisfied, duly notified the defendants thereof, and demanded the return to him of the stock and the cancellation and rescission of the sale, offering to pay the defendants the amount paid to him on delivery with interest, but that defendants neglected and refused to return the stock or to cancel the sale. It also alleged that defendants paid to other persons higher prices per share for stock of the same railroad company. *Held*, that the complaint set forth two causes of action, one in affirmance of the contract to recover the additional price agreed to be paid, the other based upon the theory of the rescission of the contract and a refusal of defendants to return the stock which would entitle defendants to recover its value as for a conversion; that said causes of action were inconsistent; and that a decision of the court on trial requiring the plaintiff to elect as to which cause of action he would rely upon was proper. *Stewart v. Huntington.* 127

5. Plaintiff elected to rely upon his claim for the higher price alleged to have been paid by defendants to others. To sustain this branch of the case plaintiff gave evidence to the effect that a corporation was organized for the purpose of constructing the railroad in which defendants were the principal stockholders; that certain owners of stock of said railroad company brought actions against said corporation and the defendants and others, to recover moneys belonging

to the railroad company alleged to have been misappropriated by the officers of said corporation, and for other relief; that said actions were settled by the construction company; that it paid to one B., who brought one of said actions and who was owner of 200 shares of the railroad stock, the sum of \$85,000 in settlement of his suit, it taking a transfer of his stock. It did not appear that in the settlement made anything was said in reference to the amount to be allowed or paid for the stock. *Held*, that this was not a sale within the meaning of the contract; that it contemplated the voluntary purchase of stock by the defendants, and not the amount paid in the compromise of an action; and so, that the evidence furnished no basis upon which a verdict for the plaintiff could have been entered.

Id.

6. In an action of replevin to recover possession of property sold by plaintiffs to one L., but left in plaintiffs' possession until after notes given for the purchase became due and were dishonored, and which had been levied upon by defendants by virtue of an attachment against L., plaintiffs alleged title to the property, and, also, that they "had a special property therein, to wit: A lien for unpaid purchase-money." The defendants' answer denied specifically both of these allegations. No motion was made to make the complaint more definite and certain. At the beginning of the trial defendants moved that plaintiffs be compelled to elect whether they would seek to recover on the ground of ownership or of a lien for unpaid purchase-money. The court decided to first hear the evidence, and defendants excepted. At the close of plaintiffs' case, defendants offering no evidence, both parties asked the court to direct a verdict. *Held*, that as it did not appear defendants were harmed by the ruling of the court, it was not a ground of review; that as the two inconsistent claims appeared in the complaint, defendants should, before answering, have moved that plaintiffs be compelled to elect. *Tuthill v. Skidmore*. 148

7. Also *held*, that plaintiffs, by alleging and asserting on the trial absolute ownership, and also a special interest or lien, did not thereby waive their special interest or lien, as the inconsistency between the two claims arose not from the facts, but related wholly to the legal conclusions to be drawn from conceded facts. *Id*

8. In an action to recover back money paid by plaintiff to defendant, who carried on a business known as "a matrimonial bureau," on an agreement by him to procure a husband for her; he to return the money paid on a day named, if at that time she was willing to give up all acquaintance with gentlemen introduced to her by defendant, there was no evidence of actual over-persuasion or undue influence. The court held, as a legal conclusion, that the contract was illegal, and that the parties to it were equal in guilt, and directed a verdict for defendant. *Held*, error; that while the contract was illegal, at most the inferences to be drawn from the facts as to the equality of guilt were for the jury. *Duval v. Wellman*. 156

9. Plaintiff, who was entitled to a share in the estate of C., presented a claim against his executor B. for the alleged negligent failure of the latter to rent certain real property belonging to said estate. In consideration of the payment to her by B. of her share in the estate and his parol agreement that he would leave her a share of his own estate, equal to that he should leave H. and K., and that it would amount to more than sufficient to compensate her for any loss she had sustained, plaintiff conveyed to B. her interest in the estate and executed a written release of all claims against B. on account of the loss of rent. B. died, leaving a will, by which he gave to H., K. and plaintiff \$1,000 each; his residuary estate he directed to be distributed according to law. H. and K. took each one-twelfth interest in said residue. In an action against B.'s executors to recover damages for an alleged breach of the parol agreement, the trial court, at defendant's request,

charged the jury that the only agreement they could find was that B. had agreed to leave plaintiff by his will a share of his estate equal to that which he should leave H. and K. This was not excepted to. The court, however, refused to charge that plaintiff could not recover more than an amount to which, under the will, H. and K. were entitled; but charged that she could recover, irrespective of what H. and K. received, the amount of her claim for lost rent, with interest. A verdict was rendered for the full amount of the claim. The General Term modified the verdict by allowing, in case plaintiff should by stipulation consent thereto, a recovery for an amount equal to one-third of the residuary estate with interest. *Held*, that both rulings were error. *Andrews v. Brewster*. 433

10. Defendant moved on the trial for a dismissal of the complaint on the ground that as there had been no accounting by the executor, the exact amount of the residuary estate was not ascertainable, and plaintiff's only remedy was in equity. *Held*, untenable; that the court had ample power to inquire into the amount of the estate and ascertain the sum to be divided among the residuary legatees; that if the case was one triable by the court at Special Term, it could have been sent to that court by the Circuit Court, but as defendants made no such request their right to object to a jury trial did not survive its commencement. *Id.*

11. In an action to recover damages for the alleged negligent killing of R., plaintiff's intestate, it appeared that he was in defendant's employ, engaged in tiering up freight in the hold of one of its vessels and received the injuries which caused his death, while coming up from the hold on an elevator used in the work, by being caught between the elevator and the combing of the hatch. There was room enough upon the elevator for him to stand without being exposed to danger, and there was no evidence from which it could be inferred that he used the precautions of a prudent

man. At the request of the plaintiff's counsel the court charged that "if the deceased was rightfully on the elevator at the time of his injury, in the absence of the testimony of an eye witness of the accident, the jury may assume that he received his injury in the performance of his duty and had not omitted the precautions which a prudent man would take in the presence of known danger." *Held*, error. *Riordan v. Ocean S. S. Co.* 655

—Where an action has been referred on stipulation of parties, as a jury trial is thus waived, a motion by one of them to vacate the order of reference and for a trial by jury is addressed to the discretion of the court and a denial thereof is not reviewable here.

See Winans v. Winans.

140

—When expressions of trial court in charge calculated to excite prejudice in minds of jury against one of the parties a sufficient ground for reversal. *See Hogan v. C. P., N. & E. R. R. Co. (Mem.)* 647

TRUSTS AND TRUSTEES.

1. The rule that when deposits are received by a bank, unless they are special deposits, they belong to it as a part of its general funds, and the relation of debtor and creditor arises between it and the depositor, applies where the deposit is of trust money, unless the act of depositing it is a misappropriation of the fund. *O'Connor v. Mechanics' Bank.* 324

2. An assignment for the benefit of creditors in due form is valid as between the parties to it, and, upon acceptance of the trust by the assignee, he becomes bound to execute its directions. If fraudulent as against creditors, it is only voidable by adjudication at their election, or that of some one of them, and until an attack is made with a view to such a judicial determination, it will be treated as valid and must be executed accordingly. *Knott v. Central Nat. Bank.* 552

3. Title is vested in the assignee for the purpose merely of executing the trust in the manner directed, a creditor, paid pursuant to such directions, receives his debt through the execution of the trust, and his title is supported by the pre-existing debt upon which payment has been made, pursuant to the right of the debtor to make and the creditor to receive it. *Id.*
4. Payment, therefore, by an assignee for the benefit of creditors, to a preferred creditor of the assignor of the amount of a debt honestly due him, pursuant to the directions in the assignment, before any lien has been obtained upon the fund, is effectual to vest title in such creditor to the money so paid, although the assignment, in an action subsequently commenced, is adjudged fraudulent and void as against the creditors. *Id.*

— *When and up to what time an executor, who is also testamentary trustee, is liable in the former capacity.*
See Cluff v. Day. 195

— *When trustee, appointed in another state under the will of an heir to real estate in this state, a proper party to an action to recover a balance arising on foreclosure of a mortgage upon land of which the ancestor died seized.*

See Hauselt v. Patterson. 349

UNDERTAKING.

An undertaking given on appeal to the General Term, from a decree in a foreclosure suit, instead of being in the form prescribed by the Code of Civil Procedure (§ 1331), for an undertaking to stay proceedings in such an action, was in the form prescribed (§ 1327) to stay execution on a money judgment. Plaintiff's attorneys accepted the undertaking and did not take proceedings to enforce the decree pending the appeal; this resulted in an affirmance, but during its pendency the property was sold pursuant to a decree of foreclosure and sale founded on a prior mortgage. In an action upon the undertaking, *held*, that while it was valid as a common-

law agreement, and enforceable according to its terms, as no sum was recovered or directed to be paid by the judgment appealed from, the defendants were not liable beyond the amount of costs; that their agreement could not be enlarged so as to embrace the payment of the amount decreed to be paid out of the proceeds of the sale of the real estate; and so, that a recovery of this amount was error. *Concordia S. & A. Assn. v. Read.* 189

See BOND.

VENDOR AND PURCHASER.

When the price of goods sold on credit is due and unpaid, and the vendee becomes insolvent before obtaining possession, the vendor has the right to retain possession of the property as security for the purchase-price, as against the vendee or his attaching creditor, which right is greater than a lien. *Tuthill v. Skidmore.* 148

WAIVER.

In an action of replevin to recover possession of property sold by plaintiffs to one L. but left in plaintiffs' possession until after notes given for the purchase became due and were dishonored, and which had been levied upon by defendants by virtue of an attachment against L., plaintiffs alleged title to the property, and, also, that they "had a special property therein, to wit: A lien for unpaid purchase-money." *Held*, that, plaintiffs, by alleging and asserting on the trial absolute ownership, and also a special interest or lien, did not thereby waive their special interest or lien, as the inconsistency between the two claims arose not from the facts, but related wholly to the legal conclusions to be drawn from conceded facts. *Tuthill v. Skidmore.* 148

— *As to what amounts to a waiver of a defense under the Statute of Frauds.*

See Hamer v. Sidway. 538

WASTE.

The mere fact that one of two or more executors or trustees is passive, and does not participate in the administration or interfere with the acts of his co-executors in taking possession of the property and collecting moneys of the estate, will not charge him with liability for waste by them; it must appear that he had some reason to apprehend that such might be the consequence of their acts. *Cocks v. Haviland*. 426

WILLS.

1. C., by his will, devised one-third of his real estate to his son J., one-third to his son J. C., and the remaining one-third to J. C., provided that he should survive his wife or should have a lawful child who should live to the age of twenty-one; in case neither of these events happened, then he gave the said one-third to J. J. deeded all his estate, right and interest in certain premises in which the testator died seized to J. C.; the latter died before his wife, and he had no child who lived to the age of twenty-one. In an action of ejectment, *held*, that J. had a future expectant estate in the one-third, not absolutely devised to him or his brother, which was alienable, and that this estate, with the one-third absolutely devised to him, was conveyed by his deed to J. C. (1 R. S. 723, § 10, 725, § 35.) *Griffin v. Shepard*. 70
2. To render a provision in a will effectual to furnish a greater security than that given by law for the payment of debts in the due course of administration, by charging them upon the real estate of the testator, the purpose must quite clearly appear; a mere direction to pay debts out of the property will not suffice. *In re Pincers*. 361
3. The will of M. devised to her executor one-third of her residuary estate in trust, to receive the rents and income and apply the net proceeds to the use of a beneficiary named during life, and, on the death of the beneficiary, gave the property to her children; each of the other two-thirds was disposed of in a similar manner. The testatrix authorized her executor, at any time before final division and settlement of her estate, whenever he should deem proper for any "purpose which in his discretion may render it advisable so to do," to sell any part or portion thereof. The executor sold certain of the residuary real estate. Upon settlement of his accounts, certain claims presented by him against the estate were proved and allowed, and after applying the proceeds in his hands of the residuary personal estate, there remained a balance due him. *Held*, that the proceeds of the sales of the real estate were properly treated as assets in his hands, applicable to the payment *pro tanto* of his claims. *Id.*
4. One who has accepted a benefit under a will, cannot be allowed to disappoint it, but must concede full effect to the dispositions thereof. *Lee v. Tower*. 370
5. The will of T., a resident of Pennsylvania, contained devises of real estate in this state in trust, which were in contravention of the statute limiting the period of suspension of the power of alienation. The will gave to the wife of the testator certain goods and chattels, a life estate in certain real estate and two-fifths of the income of his residuary estate, devised and bequeathed in trust, which included the lands in this state, which provisions were declared "to be in lieu, substitution and satisfaction of her dower, thirds and all other interest in my estate, real and personal, and mixed." The widow voluntarily elected to accept the provisions of the will. Upon a case submitted under the Code of Civil Procedure (§ 1279), *held*, that the widow by her election to take the provision made for her in the will, consented to all the terms and conditions annexed, and yielded any right inconsistent therewith; and, therefore, she was not entitled to dower, at least in the absence of any offer to surrender the benefit she had received under the will and to take what

- the law would allow her; that the frustration of the wishes of the testator, as to the disposition of the income from the realty in this state, did not permit the court to disappoint his expressed intentions as to dower therein. *Id.*
6. *It seems* that general words, following an enumeration of articles in the residuary clause of a will, are to be given the broadest and most comprehensive meaning of which they are susceptible, in order to prevent intestacy as to any portion of the testator's estate. *In re Reynolds.* 388
7. Except, however, in a residuary clause or where the will contains no such clause, when certain things are named in a devise or bequest, followed by a phrase, which need not, but may be, construed to include other articles, it will be confined to articles of the same general character as those enumerated. *Id.*
8. R. devised and bequeathed to his son M. certain real estate "with all the lands, buildings and appurtenances thereunto belonging, or in anywise appertaining, and including all the furniture and personal property in and upon the same, or in any manner connected therewith." The testator's office was in a building on the property so devised, and connected with it was a vault in which money and securities were kept, and when the testator died this vault contained certain securities which M. claimed under said provision of the will. The will contained a residuary clause under which the securities would pass, in case M.'s claim was not sustained. *Held*, that the general words in the bequest to M. did not include the securities. *Id.*
9. By other clauses of his will, R. devised to his wife his homestead, and gave to her "the use, for life, of all household furniture * * * and all other personal property other than money, choses in action and securities, which shall be in and upon the premises at my said homestead or habitually kept there at the time of my decease." M. claimed that the omission to make a similar exception in the provision made for him should be taken as an indication of an intention to give to the words "personal property" therein their most comprehensive meaning. *Held*, that such omission was not controlling, but simply a circumstance to be considered in connection with the whole will, in attempting to ascertain and to give effect to the testator's intention. *Id.*
10. In determining whether a will was executed in conformity to the statute (2 R. S. 63, § 40) courts will not consider the intention of the testator, but that of the legislature. *In re Conway.* 455
11. In drawing an instrument presented for probate as a will, a blank form was used, the whole of which was upon one side of the paper. A blank was left for the dispositions to be made, preceded by the words "I give, devise and bequeath my property as follows." This blank was filled up by three complete devises; at the end of the last was underlined, in parenthesis, the words "carried to back of will." Upon the back of the sheet was written the word "continued;" following it were various bequests, and then the words "signature on face of the will." The signature of the testator appeared at the end of the testimonium clause on the face of the paper, and those of the witnesses under the attestation clause. *Held* (BRADLEY, HAIGHT and BROWN, JJ., dissenting), that there was not such a subscription and signing by the testator and witnesses "at the end of the will" as is required by the statute; and, therefore, that the instrument was improperly admitted to probate. *Id.*
12. Where a will expressly confers power upon the executor to convert real estate into money, and it is evident that the testator contemplated that it must be done for the purpose of carrying the will into effect, and it appears that in no other way can the intent of the testator be effectuated, the realty will be deemed to have been con-

verted into personalty. *Fraser v. Trustees, etc.* 479

18. McN. died leaving a will disposing of both real and personal estate; the latter was insufficient, at the time the will was executed and at the time of the testator's death, to pay his debts, the expenses of administration and the legacies given. The will gave to his widow the use of the testator's house and lot during life; it gave to the executors a sum to be held in trust for her benefit during her life, and they were authorized to sell the house and lot as soon as convenient, but within three years after the death of the life tenant; it also authorized them to sell his other real

estate within three years after his death, and, until such sale, empowered them to take charge of it and its avails, and the balance of his personal property which remained after payment of debts, expenses and legacies, and to divide the residue of his estate between certain beneficiaries, as provided. In an action for a construction of the will, *held*, that a conversion of the realty into personalty being necessary to carry out the testator's purpose, it must be held to have been his intention that such a conversion should take place; and that, therefore, the realty should be considered as personalty to be disposed of in accordance with the terms of the will. *Id.*

Ex. J. M.

